Page
People of Puerto Rico v. United Theatres, Inc., 79 F. (2d) 671 ..... 4, 5, and Appendix 73
People of Puerto Rico v. Rosaly, 227 U. S. 270 25,34,35
People of Puerto Rico v. Saldana, 40 P. R. Rep. 556 61
People v. Muratti, 254 U. S. 639 26
People v. Galanes, 15 Dec. P. R. (Spanish ed.; English ed., 15 P. R. Rep. 365, 377) ..... 26, and Appendix 99
Peck Steamship Line v. New York P. R. S. S. Co., 2 P. R. Fed. 109 ..... Appendix 74
Prigg v. Comm. 16 Pet. 540 ..... Appendix 96
Railroad Co. v. Husen, 95 U. S. 470 ..... 38, and Appendix 87
Romeu v. Todd, 206 U. S. 358 46
Rafferty v. Smith, Bell & Co., 257 U. S. 226 46
Robbins v. Shelby Co., 120 U. S. 489 85,86
State v. Norman, 16 Utah 457 ..... 40, 47, 52, 55, and Appendix 82,90-97
Sturges v. Crowinshield, 4 Wheat. 122 ..... Appendix 92
Talbott v. Silver Bow County, 139 U. S. 438 46
Territory v. Alexander, 11 Ariz. 172 ..... 55-56, 57, 60, and Appendix 99
Territory v. Guyot, 9 Mont. 46 ..... 38, 40, 47, 52, 53, and Appendix 82,83,96
Territory v. Long Bell Lumber Co., 22 Okla. 890 ..... 4, 40, 47, 52, 55, and Appendix 76,83,84
Territory ex rel. Ridings v. Neville et al., 10 Okla. 79 ..... Appendix 82
Texas & Pacific Ry. Co. v. Rigsby, 241 U. S. 33 38,43,56-57
U. S. v. Holliday, 3 Wall. 407 ..... Appendix 85,86
U. S. v. Cisna, 1 McLean 254 ..... Appendix 85
U. S. v. Burdick, 1 Dak. 142 ..... Appendix 85
U. S. v. Shaw-Mux, 2 Sawy. 364 ..... Appendix 85,86
U. S. v. Earl, 9 Sawy. 79 ..... Appendix 85,86
United Theatres, Inc. v. District Court of San Juan, 47 P. R. Dec. 725 (Spanish) 1,2,4,14,43,48
United States v. Heinszen & Co., 206 U. S. 370 46
Wagner v. Minnie Harvester Co., 25 Okla. 558 ..... 4, 40, 47, 52, 55, and Appendix 76
Welch v. City of Niagara Falls, 210 N. Y. App. Div. 170 30

Page

STATUTES

CONSTITUTION

Article IV, Sec. 3, Cl. 2 ..... 16, and Appendix 1,63

FEDERAL

Anti-trust laws: Sherman Act and Clayton Act 1, *et seq.*; and Appendix I, 63-66

Anti-polygamy Act of July 1, 1862 31

Act of March 22, 1882; "Edmunds Law" Appendix V, 90-91

Act of March 3, 1887; "Edmunds-Tucker Law" Appendix V, 90,91

Act of July 7, 1898, to protect harbor defenses, etc. Sec. 2 21

Act of June 25, 1910, White Slave Traffic Act 22

Act of March 1, 1911; Sec. 523 U. S. C. 21

Act of June 14, 1917, punishing violent interference with foreign commerce, etc. 22

Act of February 25, 1917, amending National Bank Act 23

Act of February 13, 1925, amending Judicial Code; Sec. 240(a) 8

Act of June 23, 1936, extending Federal Highway Act to Puerto Rico 24

CRIMINAL CODE

Chapter 13, Secs. 311-322 ..... 59, and Appendix I, 68-69

Sec. 289 21

Secs. 311, 319 20

Sec. 320 21

Secs. 388, 389, 390, 391, 392, 393, 394, 396 19,20

Employers' Liability Act of June 11, 1906 (first Employer's Liability Act) 50-51

Federal Reserve Act, Sec. 25 23

National Defense Act of June 3, 1916 23

National Prohibition Act of September 21, 1922 24

Postal Savings Law of May 18, 1916 23

Securities Act of 1933, Act of May 27, 1933 22

Sugar Act of 1937, Act of September 1, 1937 24-25

Organic Act for Alaska, Act of August 24, 1912 23-24

Organic Act of Hawaii, Act of April 30, 1900 24

Page
Former Organic Act for Puerto Rico, "Foraker Act", April 12, 1900
Sec. 1 ... 24
Secs. 14, 27, and 32 ... Appendix I, 67-68
Organic Act for Puerto Rico, "Jones Law", March 2, 1917 ... Appendix I, 66-67
Sec. 1 ... 24
Sec. 9 ... 66
Sec. 23 ... 66-67
Sec. 25 ... 67
Sec. 34 ... 67
Sec. 37 ... 67
Sec. 57 ... 67
Organic Act for Oklahoma, Act of May 2, 1890
Sec. 3 ... Appendix III, 81
Sec. 4 ... 79
Sec. 6 ... 78-79
Organic Act for Oregon, August 14, 1848 ... 33
Organic Act for Utah of September 9, 1850 ... 21, 32, and Appendix V, 92
Organic Act for Wisconsin of 1836 ... 33
Panama Canal Act of 1912 ... 60-61
REVISED STATUTES
Sec. 1850 ... Appendix III, 80
Sec. 2139 ... Appendix IV, 84
Sec. 5278 ... 25
Sec. 5335 ... 17
Sec. 5336 ... 17,19
Sec. 5337 ... 17
Sec. 5338 ... 18
Special Codes for Alaska and District of Columbia ... 61
PUERTO RICO
Anti-monopoly and anti-trust Act of 1907 ... 1, *et seq.*, and Appendix I, 69-70
Penal Code; Secs. 269, 271, 275, 283, and 366; adultery, bigamy, incest, obscene literature ... 59, and Appendix I, 70-71
CANAL ZONE
Penal Code, Secs. 214, 216, 220, and 228 ... 61

Page

HAWAII
Criminal Code; Revised Laws of 1935, Secs. 5707, 5709, 6237, 6238, 6241, 6250 and 6251: adultery, fornication, incest, polygamy and obscene publications ..... 60, and Appendix I, 71-72

MONTANA TERRITORY
Comp. Stats., Dic. 4, Sec. 160; selling liquor to Indians ..... Appendix IV, 84

NEW MEXICO
Act of March 11, 1903 49

OKLAHOMA
Territorial Anti-trust Act of December 25, 1890 Appendix III, 77

UTAH
Act of 1852, inheritance by illegitimate children 31
Act of February 4, 1892, respecting polygamy and adultery ..... Appendix V, 90

WYOMING
Act of 1890, Chap. 73, Sec. 74, bigamy ..... Appendix V, 95

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

No. 18

THE PEOPLE OF PUERTO RICO, *Petitioner*,

vs.

THE SHELL CO. (P. R.) LIMITED, ET AL.,
Respondents.

BRIEF FOR PETITIONER

To the Honorable, The Chief Justice and the Associate Justices of the Supreme Court of the United States:

This case involves the validity of the local anti-trust act of Puerto Rico, approved March 14, 1907, "An Act to protect Trade and Commerce against Unlawful Restraints and Monopolies", Laws of Puerto Rico, 1907, pp. 328-330, Comp. of Rev. Stats. and Codes of Puerto Rico, 1911, "Trusts", Pars. 2373-2379. (Appendix I, *infra*, pp. 69-70).

The insular District Court of San Juan, following the opinion of the Supreme Court of Puerto Rico in an earlier case[1], held the local insular anti-trust act void because the Congress itself had legislated in the same field by the Sherman Anti-trust Act and the Clayton Act. The insular Su-

[1] *United Theatres, Inc.* vs. *District Court of San Juan*, 47 P. R. Dec. 725 (Spanish Text; not yet published in English Edition); translation in Appendix II, *infra*, pp. 73-75.

preme Court affirmed the District Court's judgment, adhering to its own former opinion in the earlier case; and the Circuit Court of Appeals has now agreed with it, affirming the judgment of the Supreme Court of Puerto Rico. This judgment is in harmony with an opinion of the territorial Supreme Court of Arizona, before Arizona was admitted to the Union; but is in direct conflict with the opinions of the Supreme Courts of Oklahoma, of Utah, of Wyoming, and of Montana, sustaining analogous territorial statutes enacted before the admission of those States to the Union.

This Court granted certiorari (R. 64).

QUESTION PRESENTED

The single question is whether or not the local anti-trust act, the Act of the Legislature of Puerto Rico, approved March 14, 1907, is a valid statute.

The defendants-respondents, upheld now by the judgments of the lower courts, including the Circuit Court of Appeals for the First Circuit, contend that it is not; that it was beyond the power of the insular Legislature to enact, because it was legislation in the same field covered by the federal anti-trust acts of the Congress, the Sherman Act of 1890 and the Clayton Act of 1914 (Appendix I, *infra*, pp. 63-66).

Plaintiff-petitioner, on the other hand, believes that the local statute is valid; that,—even if the federal anti-trust laws, and particularly the Sherman Act of 1890, are to be considered as extending to Puerto Rico,—yet, even so, the fact that the Congress had itself legislated for the United States at large in the same general field of anti-trust laws did not destroy nor impair, nor repeal or limit by implication, the express grant to the insular legislature of "all local legislative powers" made to it by the Congress by the Organic Act for Puerto Rico.

STATUTES

The Constitutional provision involved, with pertinent provisions of the Sherman Anti-trust Act of 1890 and of the Clayton Act of 1914, as well as of the present and former Organic Acts of the Congress for Puerto Rico, together with a copy of the local anti-trust act of 1907 of the Legislature of Puerto Rico, here involved, and other pertinent statutory provisions, are in Appendix I (*infra*, pp. 63-72).

STATEMENT

This was an information filed by plaintiff-petitioner, The People of Puerto Rico, in the insular District Court of San Juan, against The Shell Company and the other defendants-respondents, for violation of the local anti-trust act of the Legislature of Puerto Rico. The "amended information" is on pp. 1-4 of the record. It charges conspiracy to restrain and prevent free competition in the distribution and sale of gasoline, and to fix uniform and arbitrary wholesale and retail prices. The several defendants-respondents demurred (R. 6-27).

OPINION OF THE DISTRICT COURT OF SAN JUAN

The District Court sustained the demurrers, because (R. 27):

> "the Supreme Court of Puerto Rico held in its judgment of December 10, 1934, in the case of *The United Theatres, Inc.* vs. *District Court of San Juan, certiorari,* that the act is not in force in Puerto Rico on the ground that the Sherman Act of 1890 is the one applicable, supplemented by the Clayton Act of 1914 of the Congress of the United States, which covers the entire field of the local act, and considering the case of *El Paso & Northeastern Railway Co.* v. *Gutierrez,* 215 U. S. 87, within the jurisdiction of the District Court of the United States for Puerto Rico."

OPINION OF THE SUPREME COURT OF PUERTO RICO

On appeal, the insular Supreme Court, on December 20, 1935, affirmed the judgment of the District Court ("dismissed" the appeal; R. 36-45). In so doing it followed (R. 37, 41) its own previous decision in the *United Theatres* case (*The United Theatres, Inc.* v. *District Court of San Juan, supra,* 47 P. R. Dec. 725)[2].

Its attention having been invited, upon the argument (R. 43), to the contrary opinion of the Supreme Court of the Territory of Oklahoma in the case of *Territory* v. *Long Bell Lumber Co.*, 22 Okla. 890; 99 Pac. 911 (Appendix III, *infra*, pp. 76-83), followed by the same court, as settled law, in *Wagner* v. *Minnie Harvester Co.*, 25 Okla. 558; 106 Pac. 969-971, the Puerto Rico Supreme Court said only, after quoting somewhat at length from the Oklahoma decision (R. 44):

> "The Supreme Court of Oklahoma, in an elaborate opinion, carefully considered the question raised, and upheld with copious citations the validity of the local statute. **This would also be our view** if we did not feel restrained by the decisions of the Supreme Court of the United States. It may be that we have wrongly interpreted the doctrine laid down by that high court, in which case we would be glad to know that we were mistaken and that our error was corrected; but up to the present time we have not been convinced that we erred in such interpretation. **The right of the Insular Legislature and officers to prosecute and punish such monopolies as may be set up within our jurisdiction is really inestimable. It was so understood by our Legislature when it took upon itself to legislate on the subject. This is a wholesome and**

[2] Appealed to Circuit Court of Appeals, First Circuit; but appeal dismissed, without any consideration of the merits, for want of jurisdiction, because the order of the insular Supreme Court in that case was not a final judgment. *People of Puerto Rico* v. *United Theatres, Inc.*, 79 F. (2d) 671, 672-673.

necessary legislation that should be enforced through the insular courts. It must be admitted that The People of Puerto Rico has a special interest in prosecuting before the courts those citizens who violate its own laws. No matter how interested the National Government may be in prosecuting such offenses, instances might occur where the latter would pass unnoticed by the federal officers, or where, for some reason or other, such officers might not display the same activity and interest that is to be expected from the local officials."

UNITED THEATRES CASE

The gist of the opinion of the Supreme Court of Puerto Rico, in the earlier *United Theatres* case [3], is that the federal statutes, the Sherman Anti-trust Act of 1890, and the Clayton Act of 1914, are in force in Puerto Rico; that Appendix II, (*infra*, p. 73):

> "The Sherman Act, supplemented as it was in 1914 by the Clayton Act, covers the entire ground of the local law";

and that (*infra*, p. 75):

> "If the Sherman Act alone covered the entire ground of the local law of 1907, then that law was a futile attempt to regulate matters which were not a rightful subject of legislation. If the local law ever went into effect, it was superseded by the Sherman Act as sup-

[3] 47 Dec. P. R. 725, *supra; English translation, copied from the transcript of the record filed in the Circuit Court of Appeals, First Circuit, on the appeal in that case, People of Puerto Rico* vs. *United Theatres*, No. 3056 *in that court* [appeal dismissed by that court for want of jurisdiction, 79 F. (2d) 671], *is in Appendix II, infra*, pp. 73-75, expressly overruling (*infra*, p. 73) its own former contrary opinion of May 27, 1932, in *People of Puerto Rico* v. *District Court of Mayaguez*, 43 Dec. P. R. 554 (*Spanish Edition; not yet published in the English Edition; translation in Appendix VI, infra*, pp. 98-101).

plemented and expanded by the Clayton Act. *El Paso & Northeastern Railway Co.* v. *Gutierrez*, 215 U. S. 87. "We have not overlooked the fact that in the instant case there is no conflict between the local law and the federal statute. It is also true that in the *Gutierrez* case there was a conflict between the New Mexico and the Federal Employers' Liability Act. The Supreme Court, however, instead of stressing this aspect of the case, rested its decision squarely on the ground that the federal statute regulating commerce in the territories had superseded the territorial law on the same subject. This court, of course, is bound by that decision; and the doctrine thereof which does not appear to have been qualified or modified by any subsequent decision of the Supreme Court must control our disposition of the case at bar."

That is everything the court said on that question in its decision in the *United Theatres* case.

OPINION OF THE CIRCUIT COURT OF APPEALS

The Circuit Court of Appeals for the First Circuit, in its opinion, November 20, 1936 (R. 49-61), affirming the judgments of the lower courts, agreed with the opinion of the Supreme Court of Puerto Rico, and with that of the former territorial Supreme Court of the Territory of Arizona, and expressly disagreed with the opinions of the Supreme Courts of Oklahoma, of Wyoming, of Montana, and of Utah (R. 58-61).

CONTRARY OPINIONS OF OTHER COURTS

The gist of the contrary opinion of the Supreme Court of Oklahoma, upholding the local anti-trust act of that territory, is in Appendix III (*infra*, pp. 76-83), and of those of the Supreme Courts of Montana and of Utah, upholding local territorial statutes despite direct Congressional legislation in those same fields [MONTANA, selling liquor to a reservation Indian; UTAH, adultery], are in Appendices IV and V (*infra*, pp. 84-89, and 90-97). The reasoning of

the WYOMING Supreme Court, sustaining the local territorial statute against bigamy, is along the same lines as that of the Montana, Utah, and Oklahoma courts. [*In Re Murphy*, 5 Wyo. 297; 40 Pac. 398.]

PETITIONER'S CONTENTION

The position of the petitioner here, the People of Puerto Rico, is that the Supreme Courts of Oklahoma, of Utah, of Wyoming, and of Montana, were right; and that those of Arizona and of Puerto Rico (and of the Circuit Court of Appeals, First Circuit, in affirming the judgment of the Puerto Rico Supreme Court in the present case), were wrong; that it is doubtful whether the federal anti-trust laws, particularly the Sherman Act of 1890, should be considered to extend to Puerto Rico; but that, in any event, even if they are to be considered as in effect there, yet that mere fact,—if those federal statutes, the Sherman Anti-trust Act of 1890, and the Clayton Act of 1914, should be considered to be in effect in Puerto Rico as general laws of the United States, and *in pari materia* with the local Puerto Rican Act of 1907 against monopolies,—would not effect any implied repeal of,—nor "invalidate" nor "supersede",—the local insular Act in any way; inasmuch as the local Act is not in conflict with the federal statutes, but is in harmony with them, and supplements the federal statutes by covering "monopolies" also, and by providing remedies in the insular courts.

OPINIONS BELOW; REPORTS

The opinion of the insular District Court (R. 27, "Judgment") is not officially reported. The opinion of the insular Supreme Court (R. 36-45) is officially reported in 49 P. R. Dec. (Spanish Edition), p. 226; it has not yet appeared in the English edition of the Puerto Rico Reports. The opinion of the Circuit Court of Appeals (R. 49-61) is reported in 86 F. (2d), 577.

JURISDICTION

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code of the United States, as amended by the Act of February 13, 1925, c. 229, 43 Stat. 938.

The judgment of the Circuit Court of Appeals was entered November 20, 1936 (R. 61). The time within which to apply for a writ of certiorari to this court was extended twenty-eight days by order of MR. JUSTICE BRANDEIS, until March 20, 1937 (R. 63), and afterwards ten days more, by another order of MR. JUSTICE BRANDEIS, until March 30, 1937 (R. 64).

The petition for certiorari, together with the supporting brief for petitioner, and the transcript of the record, was filed in this Court on March 29, 1937, within the time thus limited. Certiorari was granted on May 17, 1937 (R. 64).

SPECIFICATION OF ERRORS TO BE URGED

These are indicated under the headings "Question Presented" and "Petitioner's Contention" (*ante* p. 2, and p. 7).

SUMMARY OF ARGUMENT

The Supreme Court of Puerto Rico and the Circuit Court of Appeals were wrong in holding that the local statute against monopolies was repealed or annulled, or in any way "invalidated" or "superseded" by the federal anti-trust statutes, the Sherman Act of 1890 or the Clayton Act of 1914.

It is really immaterial, for the purposes of this case, whether those federal anti-trust statutes be considered as applicable to Puerto Rico and in force there, or not. If they do not extend to Puerto Rico, then, of course, they do not in any way affect the validity of the local anti-trust act of the Legislature, and there can be no question of the validity of that act. If, on the other hand, the federal anti-

trust acts are to be considered as in force in Puerto Rico, then the validity of the local anti-trust act of the Legislature likewise remains unaffected, for the reasons hereinafter stated.

The Organic Act grants the Legislature "all local legislative powers" to "extend to all matters of a legislative character not locally inapplicable". Enactment of an anti-monopoly or anti-trust act was a proper exercise of the Territorial police power, under this grant of "all local legislative powers".

The Congress has placed no express limitation, either by the Organic Act or by any other act of Congress, upon this broad grant of all local legislative powers, either with respect to exercise of the police power, generally, or with respect to enactment of anti-trust laws or anti-monopoly laws. *If there be any,* it must necessarily be some *implied limitation,* arising by implication out of some other act of Congress. And that is, in fact, respondents' contention, in which they were upheld by the lower courts. They contend that the federal anti-trust acts extend to Puerto Rico, and that, inasmuch as the Congress, by general anti-trust acts for the United States at large, has itself legislated in this same field, therefore the general legislation of the Congress in the same field annuls by implication, or limits, or repeals by implication, to that extent, the broad grant in the Organic Act of "all local legislative powers" to the local Legislature, and, therefore, operates by implication to withdraw or to annul or repeal the power which the Legislature would otherwise have possessed, under that broad grant, to exercise the local police power in this direction by enactment of a local anti-trust law or anti-monopoly law for the Island.

But repeals by implication are not favored; and the same rule applies equally to annulments by implication.

The broad grant to a territorial legislature of "all local legislative powers" in language such as, or similar to, that

used in the Organic Act for Puerto Rico, when taken in connection with other provisions of an Organic Act establishing, as in Puerto Rico, an organized territorial government in accordance with the American system, with legislative, executive, and judicial powers, confers substantially as plenary local legislative powers upon the territorial legislature as are habitually exercised by the legislature of a State.

Puerto Rico is, within the meaning of the foregoing rule, an "organized Territory" of the United States. This court has said: "It may be justly asserted that Puerto Rico is a completely organized territory, although not a territory incorporated into the United States, and that there is no reason why Puerto Rico should not be held to be such a territory." In the matter of local regulation and the exercise of police power, Puerto Rico possesses all the sovereign powers of an "incorporated" Territory, or of a State.

The legislative powers habitually recognized as vested in State legislatures include, inherently, the police power, to enact laws to promote the good order and the general welfare of society, as well as its safety, health and morals.

The enactment of an anti-monopoly law or an anti-trust law is an exercise of the police power.

Neither the Constitution itself, nor the entry of the Congress into any particular legislative field, abrogates the police power of the States, or limits it any further than necessary to prevent conflict or inconsistency between the local statute and the Constitution or Congressional legislation. In so far as the two do not conflict, and do not prescribe inconsistent rules, the State statute is not superseded by the Congressional act.

Since, as above pointed out, Puerto Rico, in the matter of local regulation, and in the exercise of the police power, possesses, as an "organized Territory", all the sovereign powers of a State, it follows that, in determining how far the local Legislature's power to enact a local anti-trust or

anti-monopoly law, in the exercise of its police power, is limited or abrogated by the fact that the Congress has itself legislated in the same field of anti-trust laws by general laws for the United States at large, the question is to be determined by the application of the same rule which is applied in relation to a State statute enacted in the exercise of the State's police power, in a field where the Congress has legislated in the same field in the exercise of its constitutional powers.

The foregoing lines of reasoning are substantially the same as those upon which the Supreme Courts of Montana, of Wyoming, of Utah, and of Oklahoma, sustained local statutes of those Territories, enacted in fields in which the Congress had itself legislated by general laws applicable in all the territories. [MONTANA, forbidding sale of whiskey to a reservation Indian; WYOMING and UTAH, local laws against bigamy and polygamy; OKLAHOMA, local anti-trust law]. There is no decision of this court to the contrary; and, *arguendo,* the correctness of this rule was impliedly recognized in *Davis* v. *Beason,* 133 U. S. 333, 341, where it was said: "Bigamy and polygamy * * * are crimes by the laws of the United States, and they are crimes by the laws of Idaho."

The local anti-trust and anti-monopoly act of Puerto Rico here in question is not in conflict in any way with the federal anti-trust acts.

No possibility of "double jeopardy" is here involved.

The relation between the general federal statutes and the local territorial acts is substantially the same as that between the statutes of a State and municipal ordinances, or between a corporation charter and its by-laws, or between the resolutions of a board of directors and those of an executive committee. It has never been supposed that local ordinances or subordinate by-laws or resolutions were invalid simply because they covered to some extent the same ground covered by the superior legislation, so long as they

were not in conflict with the superior legislation in any way.

The Supreme Court of Puerto Rico and the Circuit Court of Appeals misconstrued and misapplied applicable decisions of this court; and the Circuit Court of Appeals misunderstood the reasoning of the Supreme Courts of Montana, of Wyoming, of Utah, and Oklahoma, with which it disagreed.

The legislative opinion of the various territorial Legislatures and of the Congress itself, upon the question here presented, is of great weight. That opinion is evidenced by the uniform, long continued practice, both of the various territorial Legislatures and of the Congress, as appears from the facts that: (1) The Legislatures of all the territories have unanimously interpreted the grants of local legislative power to them in the various territorial organic acts as empowering them to enact statutes, although in fields in which the Congress had itself legislated by general statutes for the United States at large and for all the territories; *e.g.*, in their criminal codes, against such offenses as adultery, bigamy, incest, the circulation of obscene literature, prize fighting, and the like, and (Oklahoma as well as Puerto Rico) anti-trust laws; (2) The Congress has never annulled any such territorial acts; and (3) The Congress itself, in cases where, as for Alaska and the District of Columbia, it has enacted special territorial codes, has uniformly included in such codes provisions against the same offenses which are likewise covered, for all the territories, by the federal criminal code, thus itself impliedly recognizing that there is no inconsistency in so doing.

If the federal anti-trust act of 1890, the "Sherman Act", is to be considered as in force in Puerto Rico, then that must be because (a) the words "any Territory of the United States" as used in section 3 of that Act (Appendix I, *infra*, p. 63) are broad enough to include Puerto Rico as an "organized Territory" of the United States, although not "incorporated" into the Union, and that (b) the act is

"not locally inapplicable" in Puerto Rico, within the meaning of section 9 of the Organic Act. But then, if the Sherman anti-trust act is thus to be considered as applicable in Puerto Rico, it necessarily follows also, by parity by reasoning, that Puerto Rico is likewise to be considered as a "Territory" within the meaning of Chapter 13 of the Federal Criminal Code (Appendix I, *infra* p. 68) which, equally with the anti-trust act, is, manifestly, in its nature "not locally inapplicable" in Puerto Rico.

And, if that be the case, then, further, necessarily, if the decision of the lower courts, the Supreme Court of Puerto Rico and the Circuit Court of Appeals, in this case, is correct, that the local anti-trust or anti-monopoly act of Puerto Rico here involved is void, simply because it is local legislation in the same field in which the Congress has itself legislated by general statutes for the United States at large including all the territories, then it necessarily follows also: (1) That all of the sections of the local penal code of Puerto Rico, the Act of the Legislature of March 1, 1902, as amended, which define and punish the same or similar offenses as those covered by Chapter 13 of the Federal Criminal Code, viz., circulation of obscene literature, polygamy and bigamy, adultery, incest and prize fighting, are equally void, as are likewise all convictions had under them; and (2) Similarly, all like provisions of the criminal codes of other territories[4], and all convictions had under them, are likewise void: For example, sections 5707 and 6237 to 6251 of the Revised Laws of the Territory of Hawaii against the circulation of obscene literature, adultery, fornication, incest and polygamy and bigamy,—as well as similar provisions of the codes of other territories and possessions.

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[4] Except where the local code was originally enacted for the territory by special act of the Congress itself, as *e.g.*, for Alaska and the District of Columbia.

ARGUMENT

POINT I

The Supreme Court of Puerto Rico, and the Circuit Court of Appeals for the First Circuit in affirming its judgment, were wrong in holding that the local insular statute against monopolies, the Act of March 14, 1907, was repealed or annulled, or was in any way "invalidated" or "superseded" by the federal anti-trust statutes, the Sherman Act of 1890, or the Clayton Act of 1914.

They should have held the local statute valid; and that, therefore, the insular District Court of San Juan erred in sustaining the demurrers of the various defendants-respondents to the information presented by the People of Puerto Rico.

POINT II

It is doubtful whether the federal anti-trust act of 1890, the "Sherman Act", should be considered as extending to Puerto Rico.

A. The Supreme Court of Puerto Rico in its opinion in the *United Theatres case* (47 Dec. P. R. 725; *ante,* p. 5; Appendix II, *infra,* p. 73) which it followed in the present case (R. 36, 37), holding the federal anti-trust acts in force in Puerto Rico, overruled its own former contrary opinion of May 27, 1932, in *Davila* v. *The District Court of Mayaguez,* 43 Dec. P. R. 554; *Spanish edition; not yet published in the English edition; translation in* Appendix VI, *infra,* pp. 98-101), in which it had held that the Sherman Act did not extend to Puerto Rico.

B. The question depends upon whether or not Puerto Rico is to be considered as a "Territory" within the meaning of section 3 of the Sherman Act (Appendix I, *infra,* p. 63); because the Sherman Act is plainly the principal federal anti-trust act to be considered. It was the only federal anti-trust act in existence in 1907 at the time of the enactment of the Puerto Rican local anti-trust law of

March 14, 1907, here involved (Appendix I, *infra*, p. 69); and the provisions concerning "possessions" in the subsequently enacted federal Clayton Act of October 15, 1914 (Appendix I, *infra*, pp. 64-66), which is limited to discriminations in price between purchasers, sales etc. on agreement not to use the goods of a competitor, and acquisition by one corporation of the stock of another—*acts not charged in the information in this* case (R. 1-4),—do not appear, standing by themselves, broad enough to be given the effect of repealing by implication the pre-existing local Puerto Rican anti-trust act of 1907 here in question.

Whether or not the word "Territory" as used in section 3 of the Sherman Act enacted before the acquisition of the overseas possessions of the United States, is broad enough to extend the act to Puerto Rico, an after acquired "possession"; as an "organized" but not an "incorporated" Territory of the United States, is the question here presented.

C. This question was not specifically presented in the petition for certiorari; and, in the Circuit Court of Appeals, it was conceded, for the purposes of the argument in that court, that the Sherman Act might be considered as in force in Puerto Rico in view of the opinion of this court in *Domenech, Treasurer* v. *National City Bank*, 294 U. S. 199, holding the National Banking Act in force in Puerto Rico, as in a "Territory" where it was "not locally inapplicable." That decision, however, proceeded largely upon the ground that the Congress, by the National Banking Act, intended to create a system of national banks "co-extensive with the territorial limits of the United States" (at p. 204). That does not appear necessarily to have been the Congressional intent with reference to the anti-trust laws. That question has never been decided by this court; and, necessarily, lies at the root of this case.

D. At the time (July 2, 1890) the Sherman Anti-trust Act was approved, there existed within the continental limits of

the United States, the organized and incorporated territories of Arizona, Idaho (admitted as a State the next day), New Mexico, Oklahoma, Utah and Wyoming (admitted eight days later as a State), and the unorganized Indian Territory; and, without the continental limits, Alaska, an incorporated Territory.

It may be questioned, therefore, whether the words "Territory" and "Territories", as used in Section 3 of that Act were used technically as connoting only the organized and incorporated Territories; or in a more comprehensive sense which would include our after-acquired outlying possessions which, like Puerto Rico, though organized, are not incorporated into the Union, or even those possessions which may be neither organized nor incorporated, like Guam, but which are, nevertheless, territory belonging to the United States.

E. The use of the word "Territory", in that provision of the Constitution giving Congress the power to legislate "respecting the Territory * * * belonging to the United States" (Cl. 2, Sec. 3, Art. IV) is of slight aid in answering the question here presented.

The framers of the Constitution, in inserting the clause, doubtless had in mind the "Northwest Territory", which the Congress under the Articles of Confederation, without specific authority from those Articles, had assumed the power to organize ("Northwest Ordinance"). Yet this clause is now well understood to be a grant of legislative power over any territory that has been or may be acquired since the Constitution was adopted.

F. However, the broad connotation which has been given the word "Territory" in this clause of the Constitution has not always been followed by the Congress; nor by the courts in construing congressional enactments. The history of the federal Criminal Code is illuminating as to the congressional idea of the meaning of the word "Territory", as therein used. The Code was several years in

the making, and was the subject of careful consideration by the "Criminal and Penal Laws Commission", Senate and House Committees, Joint Committees and Conferees, as well as by the Congress itself.[5]

The general consensus of opinion of the members of the Congress was that in order for the penal statutes which had theretofore applied to Territories, to have application to the outlying possessions, appropriate amendments must be made.

The following instances indicate the congressional intent with reference to the meaning of the word "Territory".

During the discussion on the floor of the House, of the proposed amendment of Section 5335 R. S. [now 18 U. S. C. 5], and other following sections, in reply to a question by Mr. Bartlett, concerning the reason for inserting the phrase "any place subject to the jurisdiction" of the United States, Mr. Moon replied:

> "That is put in with the intention of covering Porto Rico, the Philippines, and places that have since been acquired. *The language of existing law would not include them.*" (*Italics supplied*)

R. S. 5335 applied only within the States and in foreign countries. Section 5336, R. S., which was similarly amended (18 U. S. C. 6), applied in any State or Territory; and R. S. 5337 (18 U. S. C. 7), which applied only to places

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[5]Report dated Dec. 11, 1901, submitted by Attorney General Knox to the 57th Cong. 1st Ses. 1901-1902, Senate Doc. No. 9—No. 68, 2 pts; Senate Report 4825, pt. 2, Jan. 18, 1907, 59 Cong. 2d Ses., to accompany S. 7709; Report of Special Joint Com. No. 4825, 59 Cong. 2d Ses., Jan. 10, 1907, to accompany S. 7709; Cong. Rec. Vol. 42, p. 581 to 589, Jan. 10, 1908; Senate Rep. No. 10, Pt. 1, 60th Cong. 1st Ses., Jan. 7, 1908, to accompany S. 2982, from Sp. Joint Com. on Rev. of the Laws; Doc. No. 741, 60th Cong. 2d Ses., Feb. 26, 1909.

within the *exclusive jurisdiction* of the United States, was also likewise enlarged, as was section 5338 (18 U. S. C. 8).

Mr. Clark, of Missouri, asked,

> "Is not the real reason why you use that language in that section, the fact that Porto Rico, and Guam and the Philippines occupy such an anomalous position with reference to the United States that nobody can define it?"

Mr. Moon replied,

> "We felt in a general way that they were subject to the jurisdiction of the United States, and that there ought to be protection against conspiracies there. * * *"

Mr. Clark observed:

> "Subject to its jurisdiction in such a general way, that you did not want to undertake the hazard of defining the relation that did exist. Is not that a fact?"

Mr. Moon suggested,

> "that was not within the province of the committee at all". (Vol. 42, p. 596, Cong. Rec., Jan. 10, 1908).

A somewhat similar discussion took place on the floor of the Senate, and it seemed to be generally agreed that the word "Territory" was not broad enough to include our insular possessions, and that some such clause as "any place subject to the jurisdiction of the United States" was necessary to make the sections applicable to "the Philippine Islands and some of those far off possessions". (Cong. Rec. p. 727, Jan. 15, 1908.) Senator Heyburn said the change was necessary, "*because of the additional acquisition of territory* which the United States has made *since the passage of the law as it now exists.*" (*Id.; italics supplied*).

Upon the proposal of Senator Sutherland, section 6 (an amendment of R. S. 5336) of the bill (H. R. 11701) was modified by inserting the words "*or any place subject to the jurisdiction* thereof" (*id.*). (*Italics supplied*)

Many other penal statutes which theretofore had been operating, according to their wording, only in States and Territories, were broadened, upon their embodiment into the Criminal Code, to include the "Territory or jurisdiction",[6] "Any place subject to the jurisdiction thereof",[7] "Place non-contiguous to but subject to the jurisdiction thereof".[8] Examples of these statutes are cited in the foot notes.

It will be observed that, though the three sections of the Criminal Code (Act of Mar. 4, 1909, 18 U. S. C. 388, 389, 390) cited in the foot note, pertaining to the shipment of intoxicating liquor, apply in any State, Territory, or District of the United States, "*or place noncontiguous to but subject to the jurisdiction thereof*", the Congress in the *very* next two sections of the same Act (18 U. S. C. 391, 392), relating, respectively, to the importation of "injurious birds and animals, and the transportation of illegally killed game, limited the offenses therein defined to "*the United States, or any Territory or District thereof.*"

The next section (18 U. S. C. 393) of the Act relates to the marking of packages containing "the dead bodies, or the plumage, or parts thereof of game animals, or game or other wild birds, *when shipped in interstate or foreign commerce*". (*Italics supplied*). The following section (18 U. S. C. 394) provides a penalty for the violation of certain sections.

But the next section immediately following (18 U. S. C.

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[6] R. S. 5283, 18 U. S. C. 23.

[7] R. S. 5290, 18 U. S. C. 29; R. S. 5524, 18 U. S. C. 428.

[8] Secs. 238, et. seq., Act of Mar. 4, 1909, 35 Stat. 1136; 18 U. S. C. 388, 389, 390.

396) of the same Act, prohibiting the importing or transporting of obscene books, was made to apply anywhere within the jurisdiction of the United States, as it provides:

> "Whoever shall bring or cause to be brought into the United States *or any place subject to the jurisdiction thereof*". (*Italics supplied*).

Thus in the several sections (18 U. S. C. 388, 389, 390, 391, 392, 393, 394, and 396) of the same chapter of the Criminal Code as set out in the Act of March 4, 1909, *supra,* the Congress seems quite definitely to have distinguished between the sections which it intended should have application only in the States and incorporated Territories, and those sections which it intended should apply there and also in our unincorporated outlying possessions. Other similar examples of this distinction in the Criminal Code follow.

G. It is significant that the chapter of the Criminal Code entitled "Certain Offenses in Territories" (18 U. S. C., Ch. XIII) was, by section 311 (U. S. C. 511), made to apply to offenses

> "committed within any Territory or District, *or within or upon any place within the exclusive jurisdiction of the United States*". (*Italics supplied*)

except as otherwise expressly provided. It will be noted that this general section does not, as do the sections of the Code heretofore referred to, contain such broad language as within the "Territory or jurisdiction", "any place subject to the jurisdiction thereof", or "place non-contiguous to but subject to the jurisdiction thereof"; but that the chapter is limited in its application to "any Territory or District", or place "within the exclusive jurisdiction of the United States."

Further significance is attached to the fact that section 319 (18 U. S. C. 519) of the chapter pertaining to recording certificates of marriage *et cetera,* is particularly limited to

Territories. Another section, 320 (18 U. S. C. 520), inhibiting prize fights and bull fights, applies to Territories and the District of Columbia.

Section 289 of the Criminal Code as amended by the Act of March 4, 1909, *supra* (18 U. S. C. 468), providing for the adoption of State and "organized Territory" penal laws within certain defined areas, is the single instance, in the Criminal Code as adopted by that Act, where the term "organized Territory" is used. The same language has been continued in the last amendment of that section (Act of June 20, 1935, 49 Stat. 394). Prior to the adoption of the Criminal Code the antecedent of this section referred only to State laws and made no mention of a Territory (Sec. 2, Act of July 7, 1898, 30 Stat. 717).

To this point consideration has been given to the Criminal Code as adopted by the Act of March 4, 1909 (35 Stat. 1088).

H. Certain other sections of the Criminal Code as published in the U. S. Code, are thought to be helpful in determining the connotation intended by the Congress in using the word "Territory" in penal statutes enacted by it. It will, of course, be remembered that the sections of the Sherman Anti-trust Act (sections 3 and 4) here in question are penal in their character, and, therefore, subject to strict construction.

Section 523 U. S. C. inhibiting discrimination by proprietors of theatres against persons wearing the uniform of the Army, Navy, Coast Guard or Marine Corps of the United States (Act of Mar. 1, 1911, 36 Stat. 963, as amended by section 1, of the Act of Jan. 28, 1915, 38 Stat. 800), applies "in the District of Columbia, or in any Territory, the District of Alaska *or insular possession of the United States*". (*Italics supplied*).

I. Since the acquisition of our outlying possessions it seems that when Congress has intended a criminal statute enacted by it, to be in force in a possession which is not an

"incorporated" Territory, it has used appropriate inclusive language other than the simple word "Territory", or else has so defined the term in the particular statute.

J. There is no general definition of the word "Territory" in any federal statute, such statutory definitions as there are, being limited to the particular act in which found.

FOR EXAMPLE:

In the *Act of June 15, 1917* (40 Stat. 231, 18 U. S. C. 381, punishing violent interference with foreign commerce, et cetera), "United States", as used in that Act, is defined as including "the Canal Zone, and all territory and waters, *continental or insular, subject to the jurisdiction* of the United States". (*Italics supplied*).

The definition applies to the entire Act, which includes other offences such as the mailing of treasonable letters and other non-mailable matter (18 U. S. C. 346), and espionage (50 U. S. C. 31). The definition applies also in the case of search warrants (18 U. S. C. 632).

White Slave Traffic Act (Act of June 25, 1910, 36 Stat. 827, 18 U. S. C. 403) where "Territory" is defined to include

> "the District of Alaska, *the insular possessions* of the United States, and the Canal Zone". (*Italics supplied*).

Definitions of the word "Territory" are found in many other Acts of Congress, including:

"The Securities Act of 1933" (May 27, 1933, Sec. 2, 48 Stat. 74, 15 U. S. C. 77 b [6]).

> "The term Territory means Alaska, Hawaii, *Puerto Rico,* the Philippine Islands, Canal Zone, the Virgin Islands, and the *insular possessions* of the United States". (*Italics supplied*).

The Food and Drug Act of June 30, 1906 (Sec. 12, 34 Stat. 772, 21 U. S. C. 5):

> Includes the "*insular possessions of the United States*". (*Italics supplied*).

The National Defense Act of June 3, 1916 (39 Stat. 166, 198, 32 U. S. C. 4c) provides:

> "The word *Territory* as used in this Act and in all laws relating to the land militia and National Guard shall include and apply to Hawaii, Alaska, *Puerto Rico*, and the Canal Zone". (*Italics supplied*).

Postal Savings Law (Sec. 2, Act of May 18, 1916, 39 Stat. 159, 160, 39 U. S. C. 759).

"For the purpose of this Act the word 'Territory' as used herein shall be held to include the District of Columbia, the District of Alaska, and Porto Rico."

National Bank Act, as amended by Section 7 of the Act of February 25, 1917 (44 Stat. 1224, 1229; 12 U. S. C. 36) with reference to branch banks, provides: "(f)" that the term includes those "located in any State or Territory of the United States or in the District of Columbia"; and

> (g) "This section shall not be construed to amend or repeal section 25 of the Federal Reserve Act, as amended, authorizing the establishment by national banking associations of branches in foreign countries, or dependencies, or *insular possessions of the United States.*"

Section 25 of the Federal Reserve Act (12 U. S. C. 36, Sec. 2, 41 Stat. 286) authorized the establishment of branches of National Banks "in foreign countries or dependencies or *insular possessions of the United States.*" (*Italics supplied*).

K. The political status of Puerto Rico is different from that of Hawaii or Alaska. The Acts of Congress organizing

Alaska (Act of Aug. 24, 1912, sec. 3, 37 Stat. 512, 48 U. S. C. 23) and Hawaii (Act of April 30, 1900; sec. 2, 31 Stat. 141, 48 U. S. C. 491) respectively refer to and designate each of these possessions as a "Territory".

However, the Organic Act for Puerto Rico (Act of April 12, 1900, sec. 1, 31 Stat. 77, as amended by the Act of March 2, 1917, sec. 1, 39 Stat. 951, 48 U. S. C. 731) nowhere refers to Puerto Rico as a Territory, but seemingly with care avoids so doing, by providing that the Act

> "shall apply to the *Island of Porto Rico* and to the adjacent islands belonging to the United States, and waters of those islands; * * * ". (*Italics supplied*).

Another distinction between the political status of Puerto Rico on the one hand and Hawaii and Alaska on the other is the fact that the Congress established a "Bill of Rights" for Puerto Rico, but omitted it from the organic acts for Hawaii and Alaska.

L. But in at least two instances the Congress has expressly referred to Puerto Rico as a Territory, namely in the Act giving concurrent jurisdiction of prosecutions to enforce the National Prohibition Act (Act of September 21, 1922, 42 Stat. 993, 48 U. S. C. 862), and in the Act of June 23, 1936, c. 730, 49 Stat. 1891, entitled "An Act to extend the provisions of certain laws to the island of Puerto Rico". The bill (H. R. 1382) originally referred to the "island" of Puerto Rico, but the Senate amended the bill by substituting the word "Territory" for "island" wherever it occurred; and as thus amended the bill became a law. (S. Rep. No. 2130, 74 Cong. 2d Sess.)

These designations by the Congress cannot be said to be inadvertent. They are consistent with the prior and subsequent use of the word.[9] This court has said that Puerto Rico is a "Territory" fully organized, although not incorporated into the Union (*Kopel* v. *Bingham*, 211 U. S. 468, 476).

[9]Cf. the "Sugar Act of 1937"; Pub. No. 414, 75th Cong.,

In that case it was held that Puerto Rico was a Territory within the meaning of Section 5278 R. S., providing for the return of fugitives from any State or Territory upon demand of the executive authority of another State or Territory. That case was cited approvingly in *People of Porto Rico* v. *Rosaly*, 227 U. S. 270, 274.

M. Notwithstanding the views expressed in the *Kopel case, supra*, it was said in *Balzac* v. *Porto Rico*, 258 U. S. 298, 305:

> "Neither the Philippines nor *Porto Rico* was territory which had been *incorporated in the Union* or become a part of the United States, as distinguished from merely *belonging to it;* and that the acts giving temporary government to the Philippines, 32 Stat. 691, and to Porto Rico, 31 Stat. 77, had no such effect. • • • The *Dorr Case* shows that the opinion of MR. JUSTICE WHITE of the majority, in *Downes* v. *Bidwell* has become the settled law of the court". (*Italics supplied*).

In *Gonzalez* v. *People of Porto Rico*, (C. C. A.) 51 F. (2d) 61, 63, 65, it was said with reference to section 2, 34 Stat. 768 (21 U. S. C. 2) that its provisions against the sale, etc., of adulterated food did not apply to

> "Porto Rico, or in any of the insular possessions of this government. That *the section extends only to a State, Territory, or the District of Columbia. That our insular possessions were not intended to be covered by section 2 clearly appears from section 10* (21 U. S. C. A. § 14), which makes it a crime to transport adulterated food from one State, Territory District or *insular possession* for sale, whereas section 2 omits the term insular possession". (*Italics supplied*).

N. The Supreme Court of Puerto Rico considered in *Davila* v. *District Court of Mayaguez*, 43 P. R. Dec. (Spanish Ed.) 554, May 27, 1932 (*English translation in* Appendix VI, *infra*, pp. 98.101), whether sections 2 and 3 of the Sherman Anti-trust Act were in force in Puerto Rico. The

approved Sept. 1, 1937, sess. 307, 401 (d), 404 (a).

court concluded on the authority of *People* v. ***Muratti,*** 245 U. S. 639, and *Balzac* v. *Puerto Rico, supra,* 258 U. S. 298, that those sections were not in force, reversing its own opinion in *People* v. *Galanes,* 15 Dec. P. R. (*Spanish Ed.; English Ed.,* 15 P. R. Rep. 365, 377). The court, in the *Davila Case* expressed the following view:

> "Under the above cited decisions of the United States Supreme Court *a general law of the United States applicable to the 'territories' would not include an unincorporated territory such as Puerto Rico,* unless the Congress manifested such an intention. The case of *Gonzales* v. *People of Puerto Rico,* 51 F. (2d) 61, also appears to be applicable." (*Italics supplied*).

In the instant case, however, the Supreme Court of Puerto Rico has returned to its original view that the statute in question here does apply to Puerto Rico.

The theory of the court, apparently, now is that there are no conditions in Puerto Rico that render the statute "inapplicable". It is submitted that it is not alone the local conditions but also the language of a statute that must determine whether any statute is "inapplicable" to Puerto Rico. Surely it would not be contended that a statute, for example, that by its terms was limited to the District of Columbia, would have application in Puerto Rico because local conditions in the respect to which the statute pertained were identical with the conditions in the District of Columbia. By the same token a law which by its terms applies only within States and incorporated Territories would not apply to Puerto Rico—not because the local conditions are opposed to it, but because the very wording of the statute shows that Congress did not intend that it should apply.

From the well nigh universal practice of the Congress in the use of the word "Territory" in the legislation it has enacted, from the history of such legislation, and from the

court decisions above cited, it seems clear that the Congress did not, by the use of the word "Territory" in section 3 of the Sherman Act, intend that it should have application to an after acquired "possession", such as Puerto Rico.

POINT III

If the federal anti-trust act of 1890, the Sherman Act, is not in force in Puerto Rico, then, of course, the local anti-trust act is valid.

If the federal anti-trust act, the Sherman Act of 1890, was not extended to Puerto Rico by section 14 of the former Organic Act for that Island, the "Foraker Act" of April 12, 1900 (Appendix I, *infra,* p. 67), then, of course, its existence did not, and does not now, affect in any way the validity of the local anti-trust act of the local Legislative Assembly of March 14, 1907, here involved.

And, in that case, that act was not repealed by implication by the comparatively narrow provisions of the subsequent federal Clayton Act of 1914 (Appendix I, *infra,* pp. 64-66); and it is still in force, unaffected in any way by the federal anti-trust laws.

POINT IV

But even if the federal anti-trust acts are to be considered as in force in Puerto Rico, nevertheless they do not affect the validity of the local Puerto Rican anti-trust act.

For the reasons stated in the following points of this brief, the local Act of March 14, 1907, was a valid enactment of the Legislature,—(the former "Legislative Assembly" under the former Organic Act),—in any event, even if the federal anti-trust acts be considered as in effect in Puerto Rico.

POINT V

The Organic Act of Congress for Puerto Rico grants the Legislature (with certain specific exceptions not at all pertinent

here) **"all local legislative powers"; to "extend to all matters of a legislative character not locally inapplicable".** (Sections 25 and 37; Appendix I, *infra,* p. 67).

So, likewise, did the former Organic Act for Puerto Rico, the "Foraker Act" of April 12, 1900, in force when the Legislative Assembly enacted the local anti-trust law of March 14, 1907, here in question. (Secs. 27 and 32 of the "Foraker Act"; Appendix I, *infra,* p. 68.)

A. The enactment of a local anti-monopoly and anti-trust act, such as this Act of 1907, is, in itself, a proper exercise of the legislative power thus granted.

It is a legislative exercise of the local **police power** to make regulations promotive of the good order and general welfare of society.

POINT VI

The Congress has made no express limitation, either in the present Organic Act for Puerto Rico or in the former Organic Act, or in any other act of Congress, upon this broad grant of "all local legislative powers" in Puerto Rico, either with respect to the exercise of the police power, generally, or with respect to the enactment of anti-trust laws or anti-monopoly laws, or the like, or in any other direction at all pertinent here.

Nor is there any constitutional limitation upon the power of the Congress to make this broad grant of all local legislative powers to the local legislature established to assist the Congress in exercising its constitutional duty to "make all needful Rules and Regulations respecting the Territory * * * belonging to the United States" (Const. Art. IV, Sec. 3, cl. 2).

A. *It follows, therefore, that if there be any limitation on the grant in this respect, it must necessarily be some implied limitation,* arising by implication out of the terms of some other act of Congress.

B. *And such is, in fact, the contention of the respondents,* in which they were upheld by the lower courts. *Their contention is that,*

> inasmuch as the Congress, ten years before the enactment of the first Organic Act for Puerto Rico, the "Foraker Act" of April 12, 1900, had by the Sherman Act of July 2, 1890, legislated generally for the United States at large, including the Territories, on the subject of anti-trust laws, and, further, that the Congress again, seven years after the enactment of the local anti-trust law of 1907 by the legislature of Puerto Rico, legislated once more for the United States at large, including the Territories and (this time) the insular possessions, on the subject of anti-trust laws,

therefore this general legislation of the Congress, in the same field, annuls by implication, or limits, or repeals, by implication, to that extent, the broad grant in the Organic Act of "all local legislative powers in Puerto Rico" to the local legislature; and therefore, operates, by implication, to withdraw or to annul or repeal the power which the local legislature would otherwise have possessed, under that broad grant of "all local legislative powers", to exercise the local police power in this direction, or to enact a local anti-trust, or anti-monopoly law, for the Island.

POINT VII

But repeals by implication are not favored.

The rule in general is that the two statutes will stand together, and that there will be no repeal by implication, *unless* they are *necessarily* in conflict; in which case the earlier statute must give way to the later expression of the legislative will (or the act of an inferior legislative body to that of the superior authority), *but only in so far as the necessary conflict* between them extends, and no further.

A. Another established rule is that *a general law does not repeal a special act by implication,* unless the legislative intent to work such a repeal is clear. As it has been well expressed by the Court of Appeals of New York:

> "It is a rule of construction that a special statute providing for a particular case, or applicable to a particular locality, is not repealed by a statute general in its terms and application, unless the intention of the legislature to repeal or alter the special law is manifest, although the terms of the general act would, taken strictly, and but for the special law, include the case or cases provided for by it."
>
> *Buffalo Cemetery Assn.* v. *Buffalo,* 118 N. Y. 61, 66.

And so also the Appellate Division of the Supreme Court of New York has had occasion to say, speaking of a city ordinance as affected by a general act of the State Legislature:

> "The principle is familiar that a general law does not repeal a special or general law by implication unless the intention to do so is clear."
>
> *Welch* v. *City of Niagara Falls,* 210 N. Y. App. Div. 170, 175,

citing,

> *Grimmer* v. *Tenement House Dept.,* 204 N. Y. 370, 378.

POINT VIII

The same rule applies to supposed annulments by implication, as to repeals by implication.

This court has said:

> "Nothing is better settled than that repeals, *and the same may be said of annulments,* by implication, are not favored by the courts, and that no statute will be construed as repealing a prior one, unless so clearly

repugnant thereto as to admit of no other reasonable construction".

Cope v. *Cope*, 137 U. S. 682, 686 (BROWN, J.; *italics supplied*).

In that same *Cope* case, this court upheld, under the general grant of the legislative power in the Territory to the local Legislature, made by section 6 of the Organic Act for that Territory (Act of September 9, 1850; 9 Stat. 453), a territorial statute of Utah, enacted in 1852, providing for inheritance by illegitimate children, despite the annulling provisions of the Anti-polygamy Act of Congress of July 1, 1862 (12 Stat. 501), the second section of which specifically annulled by title the ordinance for the incorporation of the Mormon Church, and then added: "And all other Acts and parts of Acts heretofore passed by the said Legislative Assembly of the Territory of Utah, which establish, support, maintain, shield or countenance polygamy."

This court said further in that case:

> "In order to subject the Territorial Act of 1852 to the annulling clause of the Act of Congress, its tendency to shield or countenance polygamy should be direct and unmistakable. No law will be declared void because it may indirectly, or by a possible, and not a necessary, construction be repugnant to an annulling act."

Cope v. *Cope*, *supra*, 137 U. S. at pp. 686-687.

POINT IX

The broad grant to a territorial legislature of "all local legislative power" in the Territory, to "extend to all matters of a legislative character not locally inapplicable", in language such as, or similar to, that used in the Organic Act for Puerto Rico, taken in connection with the other provisions of an organic act establishing, as in Puerto Rico, an organized territorial government in accordance with the American system, with legislative, executive and judicial powers, confers (with the exceptions specifically stated in the Or-

ganic Act) as plenary local legislative power upon the territorial legislature as that habitually exercised by the legislature of a State.

This court said further in the *Cope* case:

> "By Section 6 of the Act of September 9, 1850 (9 Stat. at L. 453), establishing a territorial government for Utah, it is provided: 'That the legislative power of said Territory shall extend to all rightful subjects of legislation, consistent with the Constitution of the United States and the provisions of this Act; but no law shall be passed interfering with the primary disposal of the soil; no tax shall be * * * .' With the exceptions noted in this section, the power of the Territorial Legislature was apparently as plenary as that of the Legislature of a State. *Maynard* v. *Hill*, 125 U. S. 204."
>
> *Cope v. Cope, supra*, 137 U. S. 682, 684.

And in an earlier case, *Clinton* v. *Englebrecht*, 13 Wall. (80 U. S.) 434, 441, it was said (CHASE, J.):

> "The theory upon which the various governments for portions of the territory of the United States have been organized, has ever been that of leaving to the inhabitants all the powers of self-government consistent with the supremacy and supervision of national authority, and with certain fundamental principles established by Congress."

And in another case:

> "As a general thing, subject to the general scheme of local government chalked out by the Organic Act, and such special provisions as are contained therein, the local legislature has been entrusted with the enactment of the entire system of municipal law, subject, also, however, to the right of Congress to revise, alter and revoke at its discretion. The powers thus exercised by the territorial legislatures are nearly as extensive as those exercised by any state legislature."
>
> *Hornbuckle* v. *Toombs*, 18 Wall. (85 U. S.) 648, 655-656 (BRADLEY, J.).

And, speaking by Mr. Justice Field, this court said in *Maynard* v. *Hill, supra,* in upholding the validity of an act of the Legislature of the Territory of Oregon granting a divorce by a special act to one D. S. Maynard and his wife:

> "The Act of Congress creating the Territory of Oregon, and establishing a government for it, passed on the 14th of August, 1848, vested the legislative power and authority of the Territory in an Assembly, * * *. It declared that the legislative power of the Territory should 'extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States', but that no law should be passed interfering with the primary disposal of the soil * * *. These exceptions from the grant of legislative power have no bearing upon the questions presented. The grant is made in terms similar to those used in the Act of 1836, under which the Territory of Wisconsin was organized. It is stated in *Clinton* v. *Englebrecht,* 80 U. S., 13 Wall., 444, that that Act seemed to have received full consideration; and from it all subsequent Acts for the organization of territories have been copied, with few and inconsiderable variations. * * *
>
> "What were the 'rightful subjects of legislation' when these Acts organizing the territories were passed, is not to be settled by reference to the distinctions usually made between legislative Acts and such as are judicial or administrative in their character, but by an examination of **the subjects upon which Legislatures had been in the practice of acting with the consent and approval of the people they represented.** A long acquiescence in repeated acts of legislation on particular matters, is evidence that those matters have been generally considered by the people as properly within legislative control. Such acts are not to be set aside or treated as invalid, because upon a careful consideration of their character doubts may arise as to the competency of the Legislature to pass them. * * "

Maynard v. *Hill, supra,* 125 U. S. 190, 203-204.

POINT X

Puerto Rico is, within the meaning of the foregoing decisions, an organized Territory of the United States.

The Organic Act for Puerto Rico created a local government, *quasi*-sovereign in nature, clothed with all the powers habitually recognized as granted by similar organic acts to the governments of Territories organized by the Congress in "territory belonging to the United States", during the preceding century.

The grant of "all local legislative powers in Puerto Rico", to "extend to all matters of a legislative character not locally inapplicable", invested that Legislature with all the powers [except as specifically limited by the Act] habitually understood to be granted to, and exercised by, the legislatures of other Territories; that is to say, under the foregoing decisions of this court, with substantially all the local legislative powers habitually exercised by the Legislatures of the States.

This court has said:

> "It may be justly asserted that Puerto Rico is a completely organized territory, although not a territory incorporated into the United States, and that there is no reason why Puerto Rico should not be held to be such a territory."
>
> *Kopel* v. *Bingham, Supra,* 211 U. S. 468, 476 (FULLER, CH. J.), quoted by CHIEF JUSTICE WHITE in the opinion of the court in *People of Puerto Rico* v. *Rosaly, supra,* 227 U. S. 270, 274.

The Organic Act for Puerto Rico creates a completely organized territorial government, with legislative, executive, and judicial departments, modeled upon the distribution of powers in the federal government itself:

> "a government conforming to the American system, with defined and divided powers, legislative, executive, and judicial."

People of Puerto Rico v. *Rosaly, supra,* 227 U. S. 270, 277 (WHITE, CH. J.).

This territorial government, while subject in all things to the overruling plenary power of the Congress, is yet, in local matters, *quasi* sovereign. It is, for example, so far sovereign that it may not be sued without its own consent.

People v. *Rosaly, supra,* 227 U. S. 270, 273-274, 277.

And in the *Rosaly* case, CHIEF JUSTICE WHITE, in delivering the opinion of the court (*People of Puerto Rico* v. *Rosaly, supra,* 227 U. S. at p. 274) quoted with approval what was said as to the Organic Act for Puerto Rico in an earlier opinion:

> "The purpose of the Act is to give local self-government, conferring an autonomy similar to that of the states and territories."
>
> *Gromer* v. *Standard Dredging Co.,* 224 U. S. 362, 370.

The Circuit Court of Appeals for the First Circuit has itself said:

> "In the matter of local regulations and the exercise of **police power Porto Rico possesses all the sovereign powers of a State,** and any exercise of this power which is reasonable and is exercised for the health, safety, morals, or welfare of the public is not in contravention of the Organic Act nor of any provision of the Federal Constitution."
>
> *Armstrong* v. *Goyco,* 29 F. (2d) 900, 902.

> "The situation in Puerto Rico is much the same as in the United States, where under the increasing demands of society the police power of the different States has been extended to protect the health, safety, morals and public welfare by laws and ordinances * * *. See *Euclid* v. *Ambler Co.,* 272 U. S. 365, for a very full description of the growth of the police power of the States."
>
> *Armstrong* v. *Goyco, supra,* 29 F.(2d), at p. 901.

POINT XI

The legislative power habitually recognized and vested in the Legislatures of the States includes, inherently, the police power, to enact laws to promote the good order and the general welfare of society, as well as its safety, health and morals.

This court has said:

> "* * * the States possess all the powers of the Parliament of England, except such as have been delegated to the United States or reserved by the people."
>
> *Munn* v. *Illinois,* 94 U. S. (4 Otto) 113, 124. (WAITE, CH. J.)

POINT XII

The enactment of an anti-monopoly law or anti-trust law is an exercise of the police power.

This court said in *Munn* v. *Illinois, supra,* 94 U. S. 113, 124-125, in discussing the scope of the police power:

> "When one becomes a member of society, he necessarily parts with some rights or privileges which, as an individual not affected by his relation to others, he might retain. * * * This is the very essence of government, and has found expression in the maxim: *Sic utere tuo ut alienum non laedas.* From this source come the police powers; which, as was said by CHIEF JUSTICE TANEY in the *License Cases,* 5 How. 583, 'Are nothing more nor less than the powers of government inherent in every sovereignty, * * * that is to say, * * * the power to govern men and things.' Under these powers the government regulates the conduct of its citizens one towards another, and the manner in which each shall use his own property, when such regulation becomes necessary for the public good."

POINT XIII

Neither the Constitution itself, nor the entry of the Congress into any particular legislative field in the exercise of its Constitutional powers, abrogates the police power of the State, nor limits it any

further than to prevent conflict or inconsistency between the local statute and the Constitution or Congressional legislation enacted pursuant to Constitutional power.

If there be conflict or inconsistency, then, of course, the local (State or Territorial) statute must give way.

In *Barbier* v. *Connolly*, 113 U. S. 27, 31, speaking of the police power of a State in relation to the 14th Amendment, this court said:

> "*But neither the amendment*—broad and comprehensive as it is,—nor any other amendment, *was designed to interfere with the* power of the state sometimes termed its *police power*, to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and *to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity.* (*Italics supplied*)

And even in relation to interstate commerce acts, where the Congress has acted under its Constitutional power and is thus sometimes said to have "occupied the field", yet even there State statutes are put into abeyance or "superseded" *only in so far as they are in conflict with, or inconsistent with, the Congressional legislation.* This court has said:

> "The question is * * * *whether their enforcement may expose a party to a conflict of duty.* It is enough that the two statutes operating upon the same subject matter *prescribe different rules.* In such case one must yield, and that one is the State law." (*Italics supplied*)
>
> *Gulf, Colorado & Santa Fe Ry. Co.* v. *Hefley*, 158 U. S. 98, 103.

But **in so far as "the two statutes do not conflict, do not prescribe different rules,** and only in a very general sense can be said to be in relation to the same subject matter", there **the State statute is not superseded** by the Congressional act. (*ib.*, 158 U. S., at p. 103.)

Thus, dealing with Railway Safety Appliance Acts, this court has said:

> "Without express leave of Congress, it is not possible, while the Federal legislation stands, for the States to make or enforce inconsistent laws."
>
> *Texas & Pac. Ry. Co.* v. *Rigsby*, 241 U. S. 33, 41.

And so likewise in *Railroad Co.* v. *Husen*, 95 U. S. 465, 470:

> "We admit that the deposit in Congress of the power to regulate foreign commerce and commerce among the States was not a surrender of that which may properly be denominated 'police power'. What that power is it is difficult to define with sharp precision."

And so again in *New Orleans Gas Company* v. *Louisiana Light Co.*, 115 U. S. 650, 661:

> "That there is a power sometimes called the 'police power' which has never been surrendered by the States, in virtue of which they may, within certain limits, control everything within their respective territories, and upon the proper exercise of which, under some circumstances, may depend the public health, the public morals, or the public safety, is conceded in all the cases."

POINT XIV

Since, as above pointed out, Puerto Rico, in the matter of local regulations and the exercise of the police power, possesses all the sovereign powers of a State, it follows that in determining how far the local Legislature's power to enact a local anti-trust or anti-monopoly law, in the exercise of its police power, is limited or abrogated by the fact that the Congress has itself legislated in the same field of anti-trust laws by general laws for the United States at large including the territories, the question is to be determined by the application of the same rule which is applied in relation to a State statute enacted in the exercise of the State's police power, in a field where the Congress has legislated in the same field in the exercise of its Constitutional powers.

That is the rule that was applied by the Supreme Court of Montana in *Territory* v. *Guyot,* 9 Mont. 46, 22 Pac. 134 [Appendix IV, *infra,* pp. 84-89], in upholding the local Territorial statute forbidding the sale of whiskey to Indians (applied to a sale to an Indian on a reservation), despite the act of Congress making such a sale punishable as an offense against federal law. The Montana Supreme Court, after pointing out that, with relation to the sovereign States of the Union, the police power was not abrogated by the fact that the Congress had legislated in the same field under its Constitutional powers, proceeded:

> "We are aware of the broad distinction between the government of a State and Territory but 'the legislative power of every territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States'. Rev. Stats. U. S. Sec. 1851[11].
>
> "In *Hornbuckle* v. *Toombs,* 18 Wall 655, it is adjudged that, 'as a general thing, subject to the general scheme of local government chalked out by the Organic Act, and such special provisions as are contained therein, the local legislature has been entrusted with the enactment of the entire system of municipal law, subject, also, however, to the right of Congress to revise, alter, and revoke at its discretion. The powers thus exercised by the territorial legislatures are nearly as extensive as those exercised by any State legislature'. There is no limitation upon the authority of a territory to pass laws for the regulation and restriction of 'the sale of articles deemed injurious to the health or morals of the community'. The act under consideration is clearly within the police power of the territorial government, as defined by the courts, and

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[11] "shall extend to all matters of a legislative character not locally inapplicable"; Organic Act for Puerto Rico, Sec. 37; Appendix I, *infra,* p. . .

is not inconsistent with the Constitution and laws of the United States."

Territory v. *Guyot, supra,* 9 Mont. 46; 22 Pac. 134, 135-136.

POINT XV

The foregoing line of reasoning of the Montana Supreme Court, —Coupled with the line of reasoning hereinbefore outlined in our Points V to IX, inclusive, of this Brief (*ante,* pp. 27-33), that the Congress had placed no express limitation, either in the territorial Organic Act or in any other act of Congress, upon its broad grant of all local legislative powers to the territorial legislature, either with respect to the enactment of anti-trust laws or anti-monoply laws, or the like, or with respect to the enactment of laws against bigamy or adultery, or the like,—is substantially the same line of reasoning upon which the Supreme Court of Oklahoma upheld the local Anti-Trust Act of that Territory (*Territory* v. *Long Bell Lumber Co., supra,* 22 Okla. 890, 99 Pac. 911, 913-916 [Appendix III, *infra,* pp. 76-83], followed in *Wagner* v. *Minnie Harvester Co., supra,* 25 Okla. 558, 106 Pac. 969, 971), and upon which the Supreme Courts of Utah and of Wyoming upheld the local territorial statutes of those Territories punishing adultery and bigamy [which, as valid Territorial statutes had been carried over into the body of the State laws, upon the admission of those States to the Union with provisions continuing the Territorial statutes in effect]. *State* v. *Norman, supra,* 16 Utah 457, 52 Pac. 986; *In Re Murphy, supra,* 5 Wyo. 297, 40 Pac. 398. See also *Knudsen* v. *Hanneberg,* 8 Utah 203, 30 Pac. 749.

A. It is submitted that this reasoning of the Supreme Courts of Montana, Utah, Wyoming and Oklahoma is sound; and is in accord with the decisions of this court.

B. In *Davis* v. *Beason,* 133 U. S. 333, 341, this court, in sustaining [despite the legislation of Congress in the same field, to suppress polygamy and bigamy in the Territories]

a local statute of the Territory of Idaho making it punishable to teach, advise or counsel the practice of bigamy or polygamy, said, *arguendo* (at p. 341):

> "Bigamy and polygamy are crimes by the laws of all civilized and Christian countries. **They are crimes by the laws of the United States, and they are crimes by the laws of Idaho,"**

thus plainly recognizing the power of the territorial legislature to enact local laws making those offenses "crimes by the laws of Idaho," although the Congress, by its general legislation applicable in all the territories, had expressly made the same actions "crimes by the laws of the United States."

And in the same opinion this court further said (at pp. 347-348):

> *"The position that Congress has, by its statute, covered the whole subject of punitive legislation against bigamy and polygamy, leaving nothing for territorial action on the subject, does not impress us as entitled to much weight.* The statute of Congress in reference to bigamy declared * * *.
>
> *"This is a general law* applicable to all territories and other places under the exclusive jurisdiction of the United States. It does not purport to restrict the legislation of the territories over kindred offenses or over the means for their ascertainment and prevention.[12]

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[12]It is true that this court in that same opinion in *Davis* v. *Beason*, *supra*, proceeded, immediately following the language above quoted, to say *arguendo*:

> "The cases in which the legislation of Congress will supersede the legislation of a state or territory, without specific provision to that effect, are those in which the same matter is the subject of legislation by both. There the action of Congress may well be considered as covering the entire ground."

That *dictum* of this court was relied upon in the opinions both of the Supreme Court of Puerto Rico and of the

POINT XVI

The local anti-trust and anti-monopoly act of the Legislature of Puerto Rico of March 14, 1907, here in question, is not in conflict in any way with the federal anti-trust acts, either the Sherman Act or the Clayton Act.

In the exercise of its local police power the territorial legislature of Puerto Rico has declared certain actions to be offenses against the local laws, and has made them punishable in the local courts. Some of them, but not all, are likewise offenses against the laws of the United States and are punishable in the federal courts under the Sherman anti-

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Circuit Court of Appeals in the present case (R. 38-41 and 54-55), as though it had been a definite decision of this court that the territorial legislature might not exercise its police power by legislation in any field in which the Congress had itself legislated by general law applicable in all the territories, or in the United States at large. But that language was used by this court merely by way of pure *obiter dictum* in that case, *in which this court actually upheld the validity of the local territorial statute* there questioned; and the effect of this *dictum*, so far as it might be pertinent to the present case in any way, is at least off-set by what was said by this court in the earlier paragraph of the opinion in that same case, above quoted,—(although that, also, was doubtless equally pure *dictum*),—that bigamy and polygamy *"are crimes by the laws of the United States,* and *they are crimes by the laws of Idaho."* JUSTICE FIELD certainly did not intend, by anything he said in that opinon, to cast any doubt upon the established rule that the police power of a State, or of a territory, is not abrogated by implication, or limited by implication, by the simple fact that the Congress has legislated in the same field by a general statute applicable to the United States at large and all the territories, except in so far as any local legislation may be in conflict with, or inconsistent with, an act of Congress.

Confer the comment of the Utah Supreme Court, in the *Norman* case *supra*, Appendix V, *infra*, p. 96).

trust act or the Clayton Act.[13] But *the local act* of Puerto Rico is broader, because (by section 2 of the local act) it *extends to monopolies or attempts to create monopoly*, even without combination or conspiracy; which are outside of the scope of the federal acts.

The local act prescribes no rule contrary to, or inconsistent with, the federal statute; creates no inconsistent duty; and neither directs the doing of anything forbidden by the federal statute, nor forbids the doing of anything required by federal law.

The Supreme Court of Puerto Rico itself expressly admits in its opinion in the *United Theatres case* (Appendix II, *infra*, p. 75), that **there is no conflict between the local law and the federal statute.**

POINT XVII

No possibility of "double jeopardy" is here involved.

In some of the Railway Safety Appliance cases, (*e.g.*, *Texas & Pac. Ry. Co.* v. *Rigsby, supra*, 241 U. S. 33, 41), this court has held the State statute "inconsistent" with the federal statute and, therefore, abrogated or put into abeyance by the act of Congress, because the State statute imposed State penalties for the same or very similar actions or neglects for which the federal statutes likewise provided penalties; whence it followed, inasmuch as the State and the federal government are independent sovereignties, so that a prosecution for the violation of the laws of one of them might not prevent a prosecution for the same action or neglect as a violation of the laws of the other, that, if both sets of laws were to be held valid and applicable to precisely the same action or neglect by an individual or a corporation, an offender might be subjected to cumulative

[13]But the acts charged by the information in the present case (R. 3-4) are not within the scope of the Clayton Act.

and different and perhaps contradictory penalties under the laws of the two separate sovereignties, and that, therefore, the state statute must be held to be inconsistent in that respect with the federal law, and must, therefore, give way, and be considered unenforcible, so long as the federal statute shall remain in force.

But that rule has no application whatever in considering a territorial statute, which is itself a part of the federal law, and enacted under the authority of the same sovereignty,—the United States,—by the authority of which the Congress itself sits and all of its statutes are enacted.

This court has conclusively settled the rule that in the administration of the laws of the Congress and the local territorial laws acting upon the same person in relation to the same actions which may be offenses against both laws, there can never be any conflict of jurisdiction between the federal courts and the local territorial courts, or any danger of "double jeopardy" for the offender; but that, on the contrary, the federal courts and the local courts have concurrent jurisdiction in such a case, so that whichever court first takes jurisdiction will retain jurisdiction and will decide the case, and that its judgment, either convicting or acquitting the accused, will fully protect him against any prosecution in the other court (local or federal as the case may be) for the same act as an offense against the other set of laws. *Grafton* v. *United States,* 206 U. S. 333.

Such being the established rule, it follows that the mere fact that any wrongful action, such as bigamy or adultery, —or combination in restraint of trade,—is made an offense, both against the local territorial law and also against the general federal law, does not, in itself, create any inconsistency between those laws, merely because of the fact that it may expose the offender to prosecution either in the local court, or in the federal court, depending on which court first takes jurisdiction; since he can never be exposed to double or contradictory penalties,—so long only

(as is the case here) as the local statute does not prescribe any rule of action contradictory in any way to, or inconsistent with, any rule of action prescribed by the federal statute.

POINT XVIII

The local insular statute bears substantially the same relation to the Act of Congress that a corporate by-law bears to the provisions of the charter, or the resolutions of an executive committee to those of the board of directors or of the stockholders, or the ordinances of a city council to the acts of a State legislature.

It is the office of such subordinate legislation to supplement and amplify for local purposes the more general legislation of the superior legislative authority; and it is not improper, but is indeed very usual, for such subordinate legislative authorities to repeat in their ordinances or by-laws or resolutions, portions of the legislation of the superior authority, with such additions and amplifications and local provisions as they deem proper for special occasions or to meet local conditions. And it has never been supposed that such local ordinances or subordinate by-laws or resolutions were invalid simply because they covered to some extent the same ground covered by the superior legislation, *so long as they were not in conflict with the superior legislation in any way.*

A. The insular Legislature (and, indeed, the entire insular government) is an

> "instrumentality established by Congress for the government of the people within its boundaries, with authority to sub-delegate the governmental powers to the several municipal corporations therein" (*Farmers Bank* v. *Minnesota,* 232 U. S. 516, 524),

and its legislation is a part of the body of the federal law, although applicable only within the Island, under the grant to it by the Congress of "all local legislative powers" (Or-

ganic Act, sec. 25 and 37; Appendix I, *infra*, p. 67), and bears to the Acts of Congress substantially the same relation that the ordinances of a city council bear to the statutes of the State legislature. *Talbott* v. *Silver Bow County*, 139 U. S. 438, 445-446; *National Bank* v. *Yankton County*, 101 U. S. 129, 133; *Romeu* v. *Todd*, 206 U. S. 358, 368-370; *United States* v. *Heinszen & Co.*, 206 U. S. 370, 382 *et seq.*; *Grafton* v. *United States*, 206 U. S. 333, 349, 354-355; *Rafferty* v. *Smith, Bell & Co.*, 257 U. S. 226, 232. Its acts are required by the Organic Act to be reported to the Congress, which expressly reserves "the power and authority to annul the same" (Organic Act, secs. 23 and 34; Appendix I, *infra*, pp. 66-67); and

B. Those of its acts which, like its anti-monopoly Act of March 14, 1907, here in question, were in existence on March 2, 1917, the date of the enactment of the "Jones Law",[14] the present Organic Act for the Island, are, by section 57 of that Act (Appendix I, *infra*, p. 67), expressly to "continue in force and effect", "until altered, amended, or repealed by the legislative authority herein provided for Puerto Rico or by Act of Congress of the United States".

C. Those local acts, therefore, thus enacted pursuant to express authority of the Congress, have, substantially, the status of federal legislation; so that, **upon a question of implied repeal by other or later Acts of the Congress, substantially the same rules are to be applied as between earlier and later Acts of the Congress itself, or as between earlier and later Acts of the insular Legislature, or of any other legislative authority.**

D. This was substantially the rule applied by the Supreme Court of Oklahoma in holding that the Territorial anti-trust statute of the former Territory of Oklahoma enacted December 25, 1890, was valid and enforceable because it was not in conflict or in any way inconsistent with the

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[14] Three years after the enactment of the Clayton Act of 1914.

provisions of the Sherman Act. *Territory* v. *Long Bell Lumber Co.*,[15] *supra*, 22 Okla. 890, 99 Pac. 911, 913, 914-916 (1908) [Appendix III, *infra*, pp. 76-83], followed in *Wagner* v. *Minnie Harvester Co.*, *supra*, 25 Okla. 558, 106 Pac. 969, 971 (1910).

POINT XIX

The Supreme Court of Puerto Rico and the Circuit Court of Appeals misconstrued and misapplied applicable decisions of this court; and the Circuit Court of Appeals misunderstood the reasoning of the Supreme Courts of Montana, Wyoming, Utah, and Oklahoma, with which it expressed disagreement.

A. As above stated ("Statement," *ante*, pp. 3-6), the Supreme Court of Puerto Rico followed its own earlier opinion in the *United Theatres case*. In the present case, it plainly regretted the decision to which it considered itself constrained, saying (R. 44; *quoted ante*, p. 4):

> "The right of the insular Legislature and officers to prosecute and punish such monopolies as may be set up within our jurisdiction is really inestimable",

and saying in reference to the decision of the Oklahoma court, which it held it was not at liberty to follow (R. 44):

> "*This would also be our view* if we did not feel restrained by the decisions of the Supreme Court of the United States".

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[15] And see also the cases there cited: *Cope* v. *Cope*, 137 U. S. 682 (*ante*, pp 30-32); *Davis* v. *Beason*, 133 U. S. 333 (*ante*, pp. 40-42). And it was also substantially the rule applied in the above cited decisions of the Supreme Courts of Wyoming, Utah, and Montana; *Re Murphy*, 5 Wyo. 297, 40; and Appendices IV and V, *infra*, pp. 84-97.) *Territory* v. *Guyot*, 9 Mont. 46, 22 Pac. 134 (*ante*, pp. 39-40; and Appendices IV and V, *infra*, pp. 84-97).

But it felt bound to the contrary view of the invalidity of the entire local anti-trust and anti-monopoly law,—simply because the Congress had itself legislated along the same lines by general laws for the country at large,—by the *dictum* of MR. JUSTICE FIELD, hereinbefore quoted, in *Davis* v. *Beason*, 133 U. S. 333, 348, (*ante*, p. 41, footnote 12), and by the decision of this court in *El Paso & Northeastern Ry. Co.* v. *Gutierrez*, 215 U. S. 87.

(1) As to what was said by MR. JUSTICE FIELD in *Davis* v. *Beason*, *supra* (*dictum*, 133 U. S., at p. 348), by which the insular Supreme Court held itself bound, it may be pointed out, in addition to what we have already said (*ante*, footnote 12, pp. 41-42), that it is not quite accurate to say of this local anti-trust and anti-monopoly act of Puerto Rico, as the insular court says (R. 41), that: "The Act of Congress covers the entire ground of the local statute"; since, plainly, *the provisions* of the local act (Sec. 2; Appendix I, *infra*, p. 69) *against monopolies* are wholly outside the scope of the federal act, and it may be that some of the other provisions, in section 1 of the local act, take a somewhat wider scope than the federal act, in addition to the outstanding difference that, in the local act, it is plainly the primary purpose to make the offenses involved punishable in the local courts; which, in itself, as was said by the Supreme Court of Puerto Rico, is "inestimable" [See its emphatic language on this point, above quoted; *ante*, pp. 4, 47]. These differences are in themselves sufficient to furnish a reason for the existence of this local Act, as MR. JUSTICE FIELD pointed out, in sustaining the Idaho act. *Davis* v. *Beason*, *supra*, 133 U. S., at pp. 345-348.

(2) In considering itself bound by the decision of this court in *El Paso & Northeastern Ry. Co.* v. *Gutierrez*, 215 U. S. 87, the Supreme Court of Puerto Rico simply followed in the present case (R. 41) the interpretation which it had put upon that decision in the earlier *United Theatres case* (47 P. R. Dec., *Spanish Edition*, 725, 734; Appendix II,

infra, p. 75). The gist of what it said in the *United Theatres case* is hereinbefore quoted (*ante*, pp. 5-6). It is believed that the interpretation thus put upon the decision of this court in *El Paso & Northeastern Ry. Co.* v. *Gutierrez*,—(in which interpretation the insular court is followed in effect by the Circuit Court of Appeals in this case; R. 53-54),—is clearly wrong. There appears to be nothing whatever, either in the decision or in the reasoning of the opinion of this court in the *Gutierrez case*, that should have been considered as in any way binding the Supreme Court of Puerto Rico to the conclusion to which, apparently with regret, it felt itself constrained.

Apparently the insular Supreme Court, and the Circuit Court of Appeals likewise, understood the opinion of this court in the GUTIERREZ *case as holding that whenever the Congress by a general statute applicable in a Territory legislates with relation to the same general subject upon which the Territorial Legislature has,—(or may thereafter have),—enacted local legislation, that the effect of the general act of the Congress is to withdraw or modify or repeal by implication, with relation to that entire subject, the grant of "all local legislative powers" given by the Congress by the Organic Act to the Territorial Legislature, and to repeal or annul by implication all local territorial legislation upon that subject.*

But the opinion of this court in the *Gutierrez* case does not say anything of that kind; and it is not believed that any such meaning can fairly be read into it. The case is, of course, limited by its facts. It was an action for wrongful death by an administratrix against the railway company. Her right of recovery turned upon the validity of a provision of a territorial statute of New Mexico passed March 11, 1903 (215 U. S. *supra*, at p. 90; set out in full in the margin in *Atchison, Topeka & Santa Fe Ry.* v. *Sowers*, 213 U. S. 55, 59), c. 33, p. 51, Acts of the 35th Legislative Assembly of New Mexico, reading:

> "Section 1. Hereafter there shall be no civil liability under either the common law or any statute of this Territory on the part of any person or corporation for any personal injuries inflicted or death caused by such person or corporation in this Territory, unless the person claiming damages therefor shall within ninety days after such injuries shall have been inflicted make and serve upon the person or corporation against whom the same is claimed, and at least thirty days before commencing suit to recover judgment therefor, an affidavit which shall be made before some officer * * *."

No such affidavit had been made by the plaintiff in the *Gutierrez* case. To the contrary, she relied upon the right of action given her by the federal Employers' Liability Act of June 11, 1906, 34 Stat. 232,[16] which contained no such requirement. The principal question, considered by the court (215 U. S. supra, at pp. 93-98) was of the validity of the federal Act, whether it was (p. 93) "unconstitutional so far as it relates to common carriers engaged in trade or commerce in the Territories of the United States?" The court, upon holding the Act constitutional, in so far as it related to the Territories, and that "its evident intention" was (p. 97) "to change certain rules of the common law which theretofore prevailed as to the responsibility for negligence in the conduct of the business of transportation", *necessarily held that, since the right given by it was clearly contrary to the provision of the Territorial statute* as to the necessity of the affidavit as a condition precedent to bringing action, it followed that that provision of the Territorial statute did not bar such an action against a common carrier, and that the Territorial statute was

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[16] The old "first Employers' Liability Act" of June 11, 1906, which had been held unconstitutional insofar as the Congress had attempted to make it applicable within the States, otherwise than while the carrier was engaged in interstate commerce. *Employers' Liability Cases*, 207 U. S. 463.

"superseded" insofar as it was thus in conflict with the federal statute. *The court went into no general discussion whatever of the effect of general federal statutes upon local Territorial legislation,* saying simply (*ib.* p. 93):

> "In view of the plenary power of Congress under the Constitution over the Territories of the United States, subject only to certain limitations and prohibitions not necessary to notice now, there can be no doubt that an act of Congress undertaking to regulate commerce in the District of Columbia and the Territories of the United States would necessarily supersede the territorial law regulating the same subject."

It is not believed that, in using that language, this court ever dreamed of its being given any such wide or revolutionary interpretation as that now placed upon it by the insular Supreme Court in the United Theatres case now followed by the insular Court and by the Circuit Court of Appeals in this present case. It seems clear that this court meant only to say that the Territorial legislation was "superseded" by the later federal act, *insofar as the federal act was necessarily in conflict with the Territorial statute,* and, therefore, to that extent necessarily amended or repealed it by implication, in accordance with the usual rules relating to repeals by implication. For example, it is believed that that very provision of the Territorial statute itself undoubtedly would have been considered by this court, in writing that opinion, as still remaining in force insofar as it required such an affidavit as a condition precedent to civil liability for "injuries inflicted or death caused" by any "person or corporation in this Territory", *except a common carrier as to whom the rule had been expressly changed by the Federal Employers' Liability Act of 1906.*

B.—The Circuit Court of Appeals misunderstood the reasoning of the Supreme Courts of Montana, Wyoming, Utah and Oklahoma, with which it expressed disagreement.

(1) The Circuit Court of Appeals disposes of the opinion of the MONTANA SUPREME COURT in *Territory* v. *Guyot, supra,* 9 Mont. 46, 22 Pac. 134 (*ante,* pp. 39-40; and Appendix IV, *infra,* pp. 84-89), from which we have quoted (*ante,* pp. 39-40), by saying simply (R. 60):

> "It is doubtful whether the case of *Territory* v. *Guyot, supra,* involves the question we are considering".

That is everything that the Circuit Court of Appeals says about the *Guyot case. It fails to say why it is "doubtful". We submit that the Guyot case* is directly in point; that its reasoning is sound; and its decision correct.

(2) As to the UTAH, WYOMING, and OKLAHOMA cases,—(*State* v. *Norman, supra; In Re Murphy, supra; Territory* v. *Long Bell Lumber Co., supra;* and *Wagner* v. *Minnie Harvester Co., supra*),—the Circuit Court of Appeals *apparently did not fully apprehend the primary basis of the reasoning* and of the decisions in those cases. In all of those opinions the underlying reasoning was substantially the same as that of the Montana Court in *Territory* v. *Guyot, supra,* and as that outlined in the earlier portions of this Brief. (*Confer, ante,* POINTS V-XV). Nevertheless, referring to the opinion of the Supreme Court of Utah in *State* v. *Norman, supra,* 16 Utah 457, 52 Pac. 986, the Circuit Court of Appeals says (R. 59):

> "In *State* v. *Norman, supra,* • • •. The court, in its opinion, treated a territory like a state and as having a sovereignty independent of that of the United States, and held that a conviction for a violation of the federal act would not relieve the defendant from being prosecuted for a violation of the territorial act. • • •.
>
> "We cannot follow a case based on such reasoning."

The pertinent parts of the opinion of the Utah Supreme Court in *State* v. *Norman* are in Appendix V, *infra,* pp.

90-97. Its primary reasoning is along substantially the same lines as that of the Montana court in *Territory* v. *Guyot, supra* (Appendix IV, *infra*, pp. 84-89), upon which we have already commented (*ante*, pp. 39-40, 52), and leads to the conclusion which the court states (52 Pac., at p. 988; Appendix V, *infra*, pp. 93-94):

> "The power which thus could be exercised by the territorial legislature is nearly as extensive as that exercised by any state legislature. *Hornbuckle* v. *Toombs*, 18 Wall. 648.
>
> "Nor are we able to find any provision in the organic act, or in any of the laws of congress applicable to the territory of Utah, which in any wise operated to restrain the legislature from enacting laws respecting polygamy, adultery, or other kindred offenses. The laws of congress were not enacted because the legislature had no power to legislate on these subjects. Nor was the nature of the power such as to prevent the legislature from exercising it. Acts and conduct which offend the moral sense and affect the welfare of the community constitute rightful subjects of legislation, and the legislature having had the fundamental authority to legislate on such subjects, and the acts of congress containing no limitation of such authority, nor any exclusive legislation on the subjects, the legislature had the right to enact the law of 1892, and therein define and punish adultery as a crime, even though the Edmunds-Tucker law, previously enacted by congress, provided for the punishment of such acts as offenses against the laws of the United States."

It is true that, immediately following this conclusion, the Utah court, apparently for the purpose of defending its conclusion against the objection that it might expose an offender to "double jeopardy," proceeded (52 Pac. at pp. 986-987; Appendix V, *infra*, pp. 94-96) to argue that there could be no double jeopardy, because the offense against the territory was a different offense from that against the federal government; and, in so arguing, the Utah court used

the language quoted (R. 59), by the Circuit Court of Appeals, and upon quoting which the Circuit Court of Appeals says: "We cannot follow a case based on such reasoning." Of course, the Utah court, in defending its conclusion against the objection of "double jeopardy," puts its defense on the wrong ground. It doubtless, as the Circuit Court of Appeals (R. 60) says of it, and of the Wyoming Supreme Court's opinion in *In Re Murphy, supra,* 5 Wyo. 297, 40 Pac. 398, "labored under the impression that where the same act constituted a violation of a federal law and a law of the territory, a person might be prosecuted and punished under each statute." That "impression" was, of course, wrong (if it is to be taken as meaning that he might be punished twice for the same act), as was conclusively settled by this court in *Grafton* v. *United States, supra,* 206 U. S. 333, where it was held that, inasmuch as the laws of Congress and the laws of the territory proceed from the same single sovereignty of the United States, there can be no double punishment nor double jeopardy for an act denounced as an offense by both sets of laws; and that in any such case, where an offender may have exposed himself to prosecution under both sets of laws, the court which first takes jurisdiction, whether the federal court or the territorial court, will retain jurisdiction to the end, and is clothed with the power to judge and to punish for the wrongful action, and that its judgment, whether of conviction or of acquittal, will be a bar to any prosecution in the other court.

But that mistaken impression was no essential part of the underlying reasoning, either of the Utah Supreme Court in *State* v. *Norman,* or of the Wyoming court in *In Re Murphy.* That argument was simply thrown into those opinions as an answer to a possible objection that the court's principal conclusion might expose an offender to double jeopardy. It was the wrong answer to that objection, the true answer being that double jeopardy could never

arise. *Grafton* v. *United States, supra.* But what was said on that subject can all be dropped out of the opinions of the Montana and Wyoming courts in those cases, and the line of reasoning on which they based their conclusions still stands intact.

(3) The Circuit Court of Appeals disposes (R. 60) briefly of the decisions of the Supreme Courts of WYOMING and of OKLAHOMA (*In Re Murphy, supra,* 5 Wyo. 297, 40 Pac. 398; *Territory* v. *Long Bell Lumber Co., supra,* 22 Okla. 890, 99 Pac. 911; and *Wagner* v. *Minnie Harvester Co., supra,* 25 Okla. 558, 106 Pac. 969) by saying simply: "The basis of the decision in *In Re Murphy, supra,* is like that of *State* v. *Norman.* The court labored under the impression that when the same act constitutes a violation of a federal law and a law of the territory, a person might be prosecuted and punished under each statute; that a territory stood in the same relation as a state to the government of the United States"; and that "*Territory* v. *Long Bell Lumber Co.* follows the reasoning of the *Murphy* case. And in *Wagner* v. *Minnie Harvester Co.* the court followed its decision in the case of *Territory* v. *Long Bell Lumber Co.*" **In other words, the whole basis of the refusal of the Circuit Court of Appeals to "follow the reasoning" of all those cases rested entirely upon its misunderstanding of the reasoning of the *Wyoming* and *Utah* courts with relation to the question of "double jeopardy",** as above pointed out; although all that those courts had said about "double jeopardy" was, in reality, only in the nature of "make-weight",—said in attempting (although on an erroneous theory) to dispose of a supposed objection of "double jeopardy" to the principal conclusions arrived at as a result of the main chain of reasoning in those opinions,—a supposed objection which was really mythical, as this court afterward held in the *Grafton case.*

C. The decision of the territorial Supreme Court of Arizona in *Territory* v. *Alexander,* 11 Ariz. 172, 89 Pac. 514, 515, cited in the opinion of the Circuit Court of Ap-

peals (R. 58-59), stands alone, except for the decisions of the Puerto Rico Supreme Court and of the Circuit Court of Appeals in the present case. The Arizona court held the local bigamy statute of that Territory invalid, because it was in the same field covered by the general federal statute. The Arizona court expressly disagreed with the other territorial courts. But its decision was largely based on the same erroneous impression as to "double jeopardy" that the other territorial courts had expressed. Only, the Arizona court apparently considered that the (supposed) fact that there might in reality (although perhaps not technically) be double jeopardy if an offender might be exposed for the same action to prosecution both in the courts of the Territory and in the federal courts, was a sufficient reason for holding the local statute invalid. It may be that the Arizona court's reasoning was really logically correct; *except* that it was based on a wrong premise. If the premise had really been correct, and if there had really been danger of double prosecution for the same wrongful action, then it might perhaps not improperly have been said to follow that the mere fact of exposing an offender to such double prosecution, and to different and possibly contradictory liabilities and punishments in two different courts, might have been sufficient to show the existence of a necessary conflict or inconsistency between the general federal statute and the local territorial statute, sufficient to require the local statute to yield to the federal law,—along much the same line of reasoning upon which this court, in some of the Railway Safety Appliances cases has held that local state statutes must yield to the federal statute so as to avoid the inconsistency of such possible different and contradictory liabilities; since, of course, as between the independent sovereignties of the sovereign states and the United States, the prosecution for a violation of a law of a sovereign State is not a bar to prosecution for the same act as a violation of the law of the separate sovereignty, the United States. (*Confer, e. g., Texas*

v. *Pac. Ry. Co.* v. *Higsby, supra,* 241 U. S. 33, 41; *ante,* p. 38). But the premise was cut out from under the reasoning of the Arizona court in *Territory* v. *Alexander,* only two months and five days after its decision, when this court, on May 27, 1907, finally decided, in the *Grafton case,* that there could be no double jeopardy as between territorial courts and federal courts, all sitting under the same single sovereignty; from which it follows, no inconsistency, on that ground, between federal and territorial statutes, such as the Arizona territorial court had apparently thought to exist, or such as may in reality sometimes arise between a federal statute and a statute of a sovereign State, as, for example, in the Railway Safety Appliance cases.

D. The Circuit Court of Appeals says in its opinion (R. 53, 56) that a territorial statute "could not limit or destroy" a federal agency or the operation or enforcement of a Congressional act. That, of course, is true as a general proposition; but it has no application to this case. It simply begs the question here. The Circuit Court did not say how the enforcement of this local territorial anti-trust and anti-monopoly act, by means of prosecutions for violations of it, before the local courts, for wrongful actions which may also be offenses against the general federal anti-trust laws, could possibly "limit or destroy" the effect of the federal statutes. The territorial courts are organized under the same authority of Congress as the so-called "United States District Court for Puerto Rico" (which is indeed organized by authority of another section of the same Organic Act for Puerto Rico under which the insular courts are organized). Appeals from both courts go to the same appellate tribunal, the Circuit Court of Appeals for the First Circuit, with precisely the same opportunity ultimately to be brought up to this court by petition for review on certiorari. It appears to be wholly immaterial to the ultimate decision whether the original prosecution be brought in the local insular district court or in the local so-called federal

district court. In either case the judgment would be a bar to any possible prosecution in the other court. The only effective difference, apparently, is that stated in the opinion of the Supreme Court of Puerto Rico in the present case R. 44), hereinbefore quoted (*ante*, pp. 4-5) that, administratively, and for the practical purposes of ready enforcement of the law, locally,—

> "The right of the insular Legislature and officers to prosecute and punish such monopolies as may be set up within our jurisdiction is really inestimable. It was so understood by our Legislature when it took upon itself to legislate on the subject. This is a wholesome and necessary legislation that should be enforced through the insular courts. It must be admitted that The People of Puerto Rico has a special interest in prosecuting before the courts those citizens who violate its own laws."

POINT XX

The long continued and apparently unanimous and unbroken legislative interpretation put upon the various Organic Acts for the territories, both by the territorial Legislatures and by the Congress itself, in relation to the question here involved, is entitled to great weight. It is evidenced by the following facts:

(1) The Legislatures of the Territories have uniformly, by their actions in enacting local statutes, interpreted their respective Organic Acts, granting them local legislative power, as empowering them to exercise that power to enact local statutes in the same fields in which the Congress may also have legislated by general statutes for the United States at large and for all the territories; (2) The Congress has not annulled those statutes; and (3) The Congress has itself in enacting special local territorial codes for certain territories, as for example, for Alaska and for the District of Columbia, impliedly recognized that there is no necessary inconsistency between local prosecution under local

territorial laws, as a local offense, and federal prosecution under general federal laws, as a federal offense, for the same wrongful act.

A. Chapter 13 of the federal Criminal Code (Act of March 4, 1909, Ch. 321, secs. 311-322; 35 Stat. 1148, *et seq.*; U. S. Code 18: 511-521; Appendix I, *infra*, pp. 68-69) defines and provides for the punishment, as offenses against federal law, of certain acts,

"when committed within any Territory or District".

Among these offenses are: Circulating obscene literature, polygamy, bigamy, adultery, incest, fornication, and prize fighting. These offenses, as offenses against federal law, are punishable by prosecution in the federal courts.

B. Nevertheless, the territories, in adopting their own criminal codes under Organic Acts granting local legislative power to the various local Legislatures, all in substantially the same way in which "all local legislative powers" are granted by the Organic Act for Puerto Rico, have in those codes uniformly defined and provided for the punishment of substantially these same offenses, or most of them.

For example, Title XIII, Secs. 269, 271, 275 and 283, and Title XV, sec. 366, of the Penal Code of Puerto Rico itself (*Act of March* 1, 1902; *Rev. Stats. and Codes of Puerto Rico, Pars.* 5711, 5713, 5717, 5725, *and* 5818; Appendix I, *infra*, pp. 70-71), provide for the punishment of adultery, bigamy, incest, the circulation of obscene written or printed matter, and prize fighting, as offenses against the local laws.

And that is true, not only of Puerto Rico, where there is a question whether or not Puerto Rico is a "Territory" within the meaning of such federal statutes as the Sherman Anti-Trust Act of 1890, or of this Chapter 13 of the federal

Criminal Code, but also of Hawaii and other Territories, where there can be no possible question of their status as, technically, "Territories". For example, the local territorial statutes of the Territory of Hawaii provide (*Rev. Laws of Hawaii,* 1935; Title XXII, secs. 5707 and 5709, 6237, 6238, 6241, 6250 and 6251; Appendix I, *infra,* pp. 71-72), for punishing, as offenses against that Territory or its local laws, the circulation of obscene literature, adultery, fornication, incest, and polygamy, including bigamy; and other former and present Territories and possessions have had, and have, like provisions.

C. These territorial statutes have been on their statute books for many years; they were necessary reported to the Congress when they were enacted; the Congress has never annulled them.

So far, they appear never hitherto to have been questioned in any reported cases, except those cited in this Brief (the UTAH, WYOMING, and ARIZONA cases; and the MONTANA and OKLAHOMA cases involving analogous questions under territorial statutes prohibiting the selling of liquor to Indians [Montana], and the Oklahoma local anti-trust law); and, up to the present case, always to have been upheld when questioned; *except* in the single case of the bigamy statute of Arizona, which that court held invalid in the *Alexander* case (*Territory* v. *Alexander,* 11 Ariz. 172, *supra*).

D. The Congress itself, in enacting special codes, by special acts of Congress, for some particular jurisdictions, such as for Alaska, and for the District of Columbia,—(and also,—by section 2 of the Panama Canal Act of August 24, 1912, 37 Stat. 560, approving and ratifying Executive Orders of the President promulgating laws for the Canal Zone, including its criminal code),—has specifically included similar sections providing for punishment of substantially those same actions, or many of them, in the local courts, as local offenses; thereby clearly indicating that

the Congress itself sees no necessary inconsistency in permitting prosecution for the same wrongful act, either in the local court, or else in the federal court with concurrent jurisdiction, and either as a local offense or as a federal offense. (*Confer,* Alaska Compiled Laws, 1933, ch. CLXV, "Offenses Against Morality and Decency", Secs. 4291 *et seq.* [Code originally enacted by special act of Congress, and continued in effect as the Territorial code]; Code of the District of Columbia, Secs. 870, 872, 874, 875; Penal Code of the Canal Zone, Secs. 214, 216, 220, 228, and Panama Canal Act, *supra*).

E. In Puerto Rico, in at least one rather recent case which went up to the Supreme Court of Puerto Rico, that court has itself affirmed a conviction of adultery under the local statute, apparently without any question of the validity of the local law (*People of Puerto Rico* v. *Saldana,* 40 P. R. Rep. 556); although, if the decision of the Supreme Court of Puerto Rico and of the Circuit Court of Appeals in the present case is correct, it is difficult to see why that local statute against adultery is not equally as invalid as the local anti-trust law here involved, and for exactly the same reason, that the Congress has itself legislated in the same field, by its general statute applicable in all the territories, including Puerto Rico,—[*in case Puerto Rico is to be considered as a "Territory", within the meaning either of the Sherman anti-trust act, or of Chapter 13 of the federal Criminal Code*]. It would follow, of course, in that case, that Saldana's conviction would be void; and that every other conviction had, not only in Puerto Rico, but *certainly* in Hawaii and in other fully "*incorporated*" "TERRITORIES", under all these territorial statutes to which we have referred [except those directly enacted, or specifically ratified, by the Congress itself, such as those of Alaska, the District of Columbia, and the Canal Zone], would be likewise void, and the punishments inflicted under them without any authority of law.

CONCLUSION

The decision of the Supreme Court of Puerto Rico in this case, and that of the Circuit Court of Appeals affirming it, are wrong, and should be reversed.

Respectfully submitted,
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APPENDICES

APPENDIX I

STATUTES AND CONSTITUTIONAL PROVISIONS

CONSTITUTION:

Article IV, Section 3, Clause 2, provides:

> The Congress shall have Power to dispose of and to make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States.

FEDERAL:

(1) Sections 3 and 4 of the Sherman Anti-trust Act of 1890 provide (Act of July 2, 1890, c. 647, 26 Stat. 209; 15 U. S. Code 3 and 4):

> Sec. 3. Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories, and any State or States or the District of Columbia, or with foreign nations or between the District of Columbia or any State or States, or foreign nations, is declared illegal. Every person who shall make any such contract or engage in any such combination or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by . . .
>
> Sec. 4. The several circuit courts [17] of the United States are invested with jurisdiction to prevent and restrain violations of this Act; and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity, to prevent and restrain such violations.

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[17] The jurisdiction was transferred from the circuit courts to the district courts by Section 291 of the Judicial Code, Act of March 3, 1911, c. 231, 36 Stat. 1087, 1167. (See note to 28 U. S. C. A. 431.)

(2) Sections 1, 2, 3, 4, 7, 15 and 16 of the Clayton Act provide (Act of October 15, 1914, c. 323, 38 Stat. 730, 731, 736, 737; 15 U. S. Code 12, 13, 14, 15, 18, 25 and 26):

> *Section* 1. *Words defined.* "Anti-trust laws", * * *. "Commerce" as used in this Act, means trade or commerce among the several States and with foreign nations or between the District of Columbia or any Territory of the United States and any State, Territory, or foreign nation, or between any insular possessions or other places under the jurisdiction of the United States, or between any such possession or place and any State or Territory of the United States or the District of Columbia or any foreign nation, or within the District of Columbia or any Territory or any insular possession or other place under the jurisdiction of the United States: *Provided*, That nothing in this Act contained shall apply to the Philippine Islands.
>
> Sec. 2. *Discrimination in price between purchasers.* It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly to discriminate in price between different purchasers of commodities, which commodities are sold for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, where the effect of such discrimination may be to substantially lessen competition or tend to create a monopoly in any line of commerce: * * *
>
> Sec. 3. *Sale, etc. on agreement not to use goods of competitor.* It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or any place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the

condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

Sec. 4. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Sec. 7. *Acquisition by one corporation of stock of another.* No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of another corporation engaged also in commerce, where the effect of such acquisition may be to substantially lessen competition between the corporation whose stock is so acquired and the corporation making the acquisition, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital of two or more corporations engaged in commerce where the effect of such acquisition, or the use of such stock by the voting or granting of proxies or otherwise, may be to substantially lessen competition between such corporations, or any of them, whose stock or other share capital is so acquired, or to restrain such commerce in any section or community, or tend to create a monopoly of any line of commerce.

This section shall not apply to corporations purchasing such stock solely for investment and not using the same by voting or otherwise to bring about, or in attempting to bring about, the substantial lessening of competition. Nor shall anything contained in this sec-

tion prevent a corporation engaged in commerce from causing the formation of subsidiary corporations for the actual carrying on of their immediate lawful business, * * *

Sec. 15. *Restraining violations; procedure.* The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of this Act and it shall be the duty of the several district attorneys of the United States, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations.

Sec. 16. *Injunctive relief for private parties; exception.* Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, * * *, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier * * *.

(3) The Organic Act for Puerto Rico, the "Jones Law", Act of March 2, 1917, c. 145, 39 Stat. 951 *et seq.*, provides:

Sec. 9. That the statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Puerto Rico as in the United States, except the internal revenue laws.

Sec. 23. That the Governor of Puerto Rico, within sixty days after the end of each session of the Legislature, shall transmit to the executive department of

the Government of the United States, to be designated as herein provided for, which shall in turn transmit the same to the Congress of the United States, copies of all laws enacted during the session.

Sec. 25. That all local legislative powers in Puerto Rico, except as herein otherwise provided, shall be vested in a Legislature * * * designated "the Legislature of Puerto Rico".

Sec. 34. That * * *. All laws enacted by the Legislature of Puerto Rico shall be reported to the Congress of the United States, as provided in section twenty-three of this Act, which hereby reserves the power and authority to annul the same.

Sec. 37. That the legislative authority herein provided shall extend to all matters of a legislative character not locally inapplicable, including power to create, consolidate and re-organize the municipalities * * *; also the power to alter, amend, modify or repeal any and all laws and ordinances of every character now in force in Puerto Rico insofar as such alteration, amendment, modification, or repeal may be consistent with the provisions of this Act.

Sec. 57. That the laws and ordinances of Puerto Rico now in force shall continue in force and effect, except as altered, amended, or modified herein, until altered, amended, or repealed by the legislative authority herein provided for Puerto Rico or by Act of Congress of the United States; and such legislative authority shall have power, when not inconsistent with this Act, by due enactment to amend, alter, modify, or repeal any law or ordinance, civil or criminal, continued in force by this Act as it may from time to time see fit.

(4) The former Organic Act for Puerto Rico, the "Foraker Act" of April 12, 1900, c. 191, 31 Stat. 77 *et seq.*, provided:

Section 14. That the statutory laws of the United States not locally inapplicable, except as hereinbefore or hereinafter otherwise provided, shall have the same force and effect in Porto Rico as in the United States,

except the internal revenue laws which * * * shall not have force and effect in Porto Rico

Sec. 27. That all local legislative powers hereby granted shall be vested in a legislative assembly which shall consist of two houses; one the executive council, as hereinbefore constituted, and the other a house of delegates, to consist of thirty-five members elected biennially by the qualified voters as hereinafter provided; and the two houses thus constituted shall be designated "The legislative assembly of Porto Rico".

Sec. 32. That the legislative authority herein provided shall extend to all matters of a legislative character not locally inapplicable, including power to create, consolidate, and reorganize the municipalities, so far as may be necessary, * * *; and also the power to alter, amend, modify, and repeal any and all laws and ordinances of every character now in force in Porto Rico, or any municipality or district thereof, not inconsistent with the provisions hereof: *Provided, however,* That all grants of franchises, rights, and privileges or concessions of a public or quasi-public nature shall be made by the executive council, with the approval of the governor, and all franchises * * *.

FEDERAL CRIMINAL CODE:

Chapter 13.—CERTAIN OFFENSES IN TERRITORIES, DISTRICT, OR INSULAR POSSESSIONS.

Section 511. (Criminal Code, section 311.) **Places applicable.** Except as otherwise expressly provided, the offenses defined in this chapter shall be punished as hereinafter provided, when committed within any Territory or District, or within or upon any place within the exclusive jurisdiction of the United States. (Mar. 4, 1909, c. 321, sec. 311, 35 Stat. 1148)

Section 512. (Criminal Code, section 312.) Circulating obscene literature. Whoever shall sell, * * *.

Section 513. (Criminal Code, section 313.) Polygamy. Every person who * * *.

Section 514. (Criminal Code, section 314.) Unlawful cohabitation. If any male person * * *.

Section 516. (Criminal Code, section 316.) Adultery. Whoever shall commit adultery * * *.

Section 517. (Criminal Code, section 317.) Incest. Whoever, being related to * * *.

Section 518. (Criminal Code, section 318.) Fornication. If any unmarried person * * *.

Section 520. (Criminal Code, section 320.) Prize fights and bull fights. Whoever shall voluntarily * * *.

Section 522. (Criminal Code, section 322.) Train robberies. Whoever shall willfully * * *.

Section 523. Discrimination by proprietors of theatres against persons wearing uniform of Army, Navy, etc. No proprietor, manager, or employee * * *.

PUERTO RICO:

The Act of the Legislature of Puerto Rico approved March 14, 1907, entitled "An Act to protect Trade and Commerce Against Unlawful Restraints and Monopolies", Laws of Puerto Rico, 1907, pp. 328-330, Comp. of Rev. Stats. and Codes, 1911, "Trusts", Pars. 2373-2379, provides:

Section 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade, commerce, business transactions, and lawful and free competition in a town, or among the several towns of Porto Rico is hereby declared to be illegal. Every person who shall make any such contract or engage in any such conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both such punishments in the discretion of the court.

Section 2. **Every person who shall monopolize or attempt to monopolize** or combine or attempt to combine with any other person or persons to monopolize any part of the trade or commerce in any town of Porto Rico or between the towns thereof shall be deemed guilty of a misdemeanor and shall be punished by a fine not exceeding five thousand dollars, or by imprisonment, not exceeding one year, or by both such punishments, in the discretion of the court.

Section 3. **The district courts of the island are hereby vested with jurisdiction** to prevent, prohibit, enjoin and punish violations of this law; and it shall be the duty of the attorneys of the district courts of the island to institute proceedings of injunction or any other civil proceeding to prevent, prohibit, enjoin, and restrain such violations. When the parties complained of shall have been duly notified, the court shall proceed, as soon as may be, to the hearing and determination of the case; and pending such proceedings and before final decree, the court may make such temporary restraining order or prohibition as shall be deemed just in the premises.

Section 4. Whenever it shall appear to the court before which any proceeding under this Law may be pending, that the ends of justice require that other parties should be brought before the court, it may cause them to be summoned, whether they reside or not in the district in which the court is held, and subpoenas to that end may be served in any district by the marshal thereof.

Section 5. **Any person who shall be injured** in his business or property by any other person, corporation, company or association, by reason of anything forbidden or declared to be unlawful by this Law, **may sue therefor in the court for the district in which the defendant resides, or in the court for the district in which the plaintiff resides,** and shall recover the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

Section 6. The word "person", or "persons", wherever used in this Law, shall be deemed to include corporations, companies or associations authorized by the laws of Porto Rico, the laws of any State or Territory of the United States, or the laws of any foreign country.

Section 7. This Law shall take effect on and after May 1, 1907.

REVISED STATUTES AND CODES OF PUERTO RICO:

Chapter IV.—ADULTERY.

(5711) Sec. 269. Whoever, being married, shall vol-

untarily have sexual intercourse with a person other than the offender's husband or wife is guilty of adultery, and shall be fined * * *, or imprisoned * * *.

Chapter V.—BIGAMY, INCEST, AND THE CRIME AGAINST NATURE.

(5713) Sec. 271. Every person having a husband or wife living who marries any other person, * * *, is guilty of bigamy.

(5717) Sec. 275. Persons being within the degrees of consanguinity within which marriages are declared by law to be void, who intermarry * * *, or who commit fornication or adultery * * *, are punishable by imprisonment * * *.

Chapter VII.—INDECENT EXPOSURE, OBSCENE EXHIBITIONS, BOOKS AND PRINTS, AND BAWDY AND OTHER DISORDERLY HOUSES.

(5725) Sec. 283. Every person who willfully and lewdly, either:

1. Exposes his person * * *;

3. Writes, composes, stereotypes, prints, publishes, * * * any obscene or indecent writing, * * *;

4. Writes, composes, or publishes any notice or advertisement of any such writing, paper, book, pictures, print or figures; * * *.

Title XV.—OF CRIME AGAINST THE PUBLIC PEACE.

(5818) Sec. 366. A person who engages in, instigates, * * *, or does any other act to further a contention or fight, without weapons, * * *, or a fight commonly called a ring or prize fight, * * *.

HAWAII, REV. LAWS OF 1935.

Title XXII—CRIMINAL OFFENSES.

Chapter 209—SEX OFFENSES.

Sec. 6237.—ADULTERY DEFINED * * *.

Sec. 6238.—PUNISHMENT. Every man who commits adultery shall be punished * * *; and every woman who commits adultery shall be punished by * * *.

Sec. 6241.—FORNICATION DEFINED; PUNISHMENT. Fornication is * * *. Whoever is guilty of the same shall be punished by * * *.

Sec. 6250.—INCEST DEFINED; PUNISHMENT. Persons within the degrees of consanguinity or affinity within which marriage is prohibited, who intermarry * * *, or commit an act of sexual intercourse * * *, are guilty of incest, and shall be punished by * * *.

Sec. 6251.—POLYGAMY; PUNISHMENT. Every married person who marries another husband or wife within the Territory, cohabits with such other * * * is guilty of polygamy and shall be punished by * * *.

Sec. 5707.—OBSCENE AND OTHER PROHIBITED PUBLICATIONS. The importing, printing, publishing, selling, offering for sale, putting into circulation, distributing, lending, exhibiting publicly, * * * any book, magazine, * * *, or written or printed matter of any sort which is obscene, lewd, * * * is a common nuisance.

Sec. 5709.—PUNISHMENT. Whoever is guilty of the offense of common nuisance shall be punished by * * *.

APPENDIX II

OPINION OF THE SUPREME COURT OF PUERTO RICO IN *The UNITED THEATRES, INC. ET AL.* VS. *THE DISTRICT COURT OF SAN JUAN* (47 Dec. Puerto Rico 725, Spanish Ed.).

Pertinent portions of English translation appearing on pages 55-63 of the transcript of the record on file in the Circuit Court of Appeals in No. 3056, *The People of Puerto Rico* vs. *The United Theatres, Inc., et al.*, 79 F. (2d) 671. [*Appeal to Circuit Court of Appeals dismissed for want of jurisdiction.*]

OPINION OF THE COURT

Delivered by Mr. Justice Hutchison

San Juan, Puerto Rico, December 10, 1934

The People of Puerto Rico brought a suit for injunctive and other relief under an act of the Insular Legislature entitled "An Act to protect trade and commerce against unlawful restraints and monopolies", approved March 14, 1907 (session laws 328). A district court issued a temporary restraining order, and an order to show cause why it should not be continued in force. In response to the order to show cause defendants challenged the jurisdiction of the court and moved to set aside the restraining order. This the court refused to do upon the authority of *Davila* v. *The District Court of Mayaguez*, 43 P. R. R. • • •

The Sherman Act, supplemented as it was in 1914 by the Clayton Act, covers the entire ground of the local law. The question is as to whether or not it is "locally inapplicable". After further consideration, we are unable to adhere to the conclusion reached in *Davila* v. *The District Court*.

It is "settled law that Porto Rico, although organized, is not an incorporated territory". It does not follow that "the statutory laws of the United States" must be regarded as "locally inapplicable" in the absence of a contrary

intention indicated by Congress at the time of the passage of the law in question, • • •

In *Peck Steamship Line* v. *New York & P. R. S. S. Co.*, 2 P. R. Fed. 109, 128, decided in 1906, Judge Rodey, of the United States District Court for Puerto Rico, said:

> "• • • It is difficult to see what is locally inapplicable about that portion of the anti-trust act applicable to territories • • •
>
> "In the case at bar, we fail to see how the anti-trust act is locally inapplicable in itself. On the contrary, it is locally very applicable and a salutary provision of law that the island badly needs if it is not in force already. We therefore hold that the act of Congress in question, for the purposes of this suit, at least, is not locally inapplicable, under the complaint, and is, or at least that portion of it referring to territories, in full force in Porto Rico."

Some six months after the decision in the *Peck* case, the insular Legislature, either concurring in the view of Judge Rodey that the Sherman Act, if not already in force in Puerto Rico, was a salutary statute which the island greatly needed, or else arriving independently at the same conclusion, passed the local anti-trust law. Seven years later Congress included Puerto Rico in the Clayton Act. In this there was no coercion. A jury system may be unadvisable and undesirable in "a Spanish and civil-law country". Thus far no reason has been suggested why an anti-trust law should be necessarily unsuited to the needs of such a country. In any event both the people of Puerto Rico in 1907 and Congress in 1914 have voiced the opinion that an anti-trust law was needed in Puerto Rico. We are not now prepared to say, more than a quarter of a century since the enactment of the local law and some two decades after the passage of the Clayton Act, that both Congress and the insular Legislature were mistaken and that the Sherman Act is "locally inapplicable". Even if it could be said that

the Sherman Act was locally inapplicable in 1900 or in 1907 or in 1914 or in 1917 it would not follow that it is so today. Even without the action of Congress or of the local legislature, recent events, of which we may take judicial notice as a matter of current history, would point to the conclusion that the Sherman Act is not now locally inapplicable.

If the Sherman Act alone covered the entire ground of the local law of 1907 then that law was a futile attempt to regulate matters which were not a rightful subject of legislation. If the local law ever went into effect, it was superseded by the Sherman Act as supplemented and expanded by the Clayton Act. *El Paso & Northeastern Railway Co. v. Gutierrez*, 215 U. S. 87.

We have not overlooked the fact that in the instant case there is no conflict between the local law and the federal statute. It is also true that in the *Gutierrez* case there was a conflict between the New Mexico and the Federal Employers' Liability Act. The Supreme Court, however, instead of stressing this aspect of the case, rested its decision squarely on the ground that the Federal statute regulating commerce in the territories had superseded the territorial law on the same subject. This court, of course, is bound by that decision and the doctrine thereof which does not appear to have been qualified or modified by any subsequent decision of the Supreme Court must control our disposition of the case at bar.

The order of the District Court refusing to set aside its previous restraining order, or so much thereof as provides for relief under the terms of the local anti-trust law of 1907 as the sole basis for such relief, will be annulled and, giving The People of Puerto Rico the benefit of any doubt that may arise as to certain questions which we have not discussed nor decided herein, the case will be remanded for such further proceedings in the District Court as may be within its jurisdiction, proper in the present action, and not inconsistent herewith.

APPENDIX III

CONTRARY OPINION OF THE SUPREME COURT OF OKLAHOMA

The Supreme Court of Oklahoma had precisely the same question presented to it in 1908, and decided it directly to the contrary of the decision of the Supreme Court of Puerto Rico.

It upheld an anti-trust act of the Territory of Oklahoma passed in December, 1890, a few months after the enactment of the federal Sherman Act of July 2, 1890. **Territory v. Long Bell Lumber Co.,** 22 Okla. 890; 99 Pac. 911, 913-916; followed two years later, in 1910, by *Wagner* v. *Minnie Harvester Co.,* 25 Okla. 558; 106 Pac. 969, 971.

The gist of the decision of the Oklahoma Supreme Court in the *Long Bell Lumber Co.* case, *supra,* is:

> "The consideration and determination of two propositions will in our judgment cover and dispose of all the controverted questions raised. These are: First, was the territorial anti-trust act a valid, existing law at the time of the institution of these suits; and, second, if so, did the violation of its terms as averred constitute and make the result of such acts a common and public nuisance?
>
> "Incidental to the first proposition, there is argued in the briefs of defendants in error the proposition that the territorial authorities were without jurisdiction or power to proceed under the terms of what is generally known as the 'Sherman Anti-Trust Act,' passed by Congress on July 2, 1890 [Act of July 2, 1890, c. 647, 26 Stat. 209 (U. S. Comp. St. 1901, p. 3201)],[18] section 3 of which is made specifically applicable to territories, and section 4 thereof vesting the several Circuit Courts of the United States with jurisdiction to prevent and restrain violations of the act, and making it the duty of the several district attorneys of the United States under the direction of the Attorney General to institute suits in equity for such purpose. This question has been squarely passed upon in the case of *Greer, Mills*

[18] U. S. Sode, Secs. 3 and 4; Appendix I, *ante,* p. 63.

& Co. v. *Stoller* (C. C.) 77 Fed. 1, wherein it was held that the statute against unlawful restraints and monopolies (Act July 2, 1890, c. 647, 26 Stat. 209 [U. S. Comp. St. 1901, p. 3200]) does not authorize the bringing of injunction suits in equity by any parties except the government. *Blindell et al* v. *Hagen et al.* (C. C.) 54 Fed. 40; Beach on Monopolies and Industrial Trusts, sec. 226. So that this theory may be disposed of on these authorities, and the question then arises: **Was the anti-trust act passed by the Legislature of the territory of Oklahoma on December 25, 1890, contained in chapter 83, Wilson's Rev. & Ann. St. Okl. 1903 (sections 6739-6743), a valid existing law of the territory of Oklahoma at the time of the institution of these suits?** It will be noted that the federal anti-trust act was passed on the 2d day of July, 1890, while the act of the territorial Legislature was passed about six months thereafter, and plaintiffs in error contend that, Congress having legislated upon the subject, its legislation is exclusive so far as the territorial legislation was concerned, in that it could pass no act covering the same field which could stand concurrently with the federal legislation on the subject. The rule contended for is stated in the case of *Allen* v. *Reed,* 10 Okl. 105-11, 60 Pac. 782, 784, and is as follows: 'Whenever Congress legislates upon any subject directly in relation to the government of the people of the territory, then it ceases to be a rightful subject of territorial legislation, and any law that the Legislature of the territory has enacted or enacts upon the same subject which Congress has assumed to legislate upon, is inconsistent with such laws of the United States, and is, therefore, void.' In order that the scope and purpose of the two acts brought to the attention of the court by reason of this controversy may be clearly before us, we quote that portion of the federal anti-trust act relating to this subject, which is as follows: 'Every contract, combination in form of trust or otherwise, or conspiracy, in restraint of trade or commerce in any Territory of the United States or of the District of Columbia, or in restraint of trade or commerce between any such Territory and another, or between any such Territory or Territories, and any

State or States or the District of Columbia or with foreign nations, or between the District of Columbia and any State or States or foreign nations, is hereby declared illegal. Every person who shall make any such contract or conspiracy, shall be deemed guilty of a misdemeanor, and, on conviction thereof, shall be punished by fine not exceeding five thousand dollars, or by imprisonment not exceeding one year, or by both said punishments, in the discretion of the court.' * * *

"The foregoing act of the territorial Legislature, while striking at the identical evil legislated against in the act of Congress, it will be seen contains numerous provisions not provided for under the former. Territories, being portions of the United States not yet created into States, and Congress having been given the power to dispose of and make all needful rules and regulations therein, have just such authority to legislate as is conferred upon them by Congress, limited as both are by the Constitution. **Congress not only may abrogate the laws of any territories, but it may itself, if it chooses, legislate directly for the entire local government. It may make a valid act of the Legislature void, and a void act valid. It has complete legislative authority over the people inhabiting the territories and all of the departments of the territorial government. It may restrict all legislation for a territory to itself or it may portion it out to subordinate bodies; but, when these bodies act, they act by virtue of federal authority, and their legislation is federal legislation applicable solely to their local conditions.** This authority in the territory of Oklahoma is contained and set out in section 6 of the organic act (Act May 2, 1890, c. 182, 26 Stat. 84), as follows: That the legislative power of the territory shall extend to all rightful subjects of legislation,[19] not inconsistent with the Constitution and laws of the United States, but no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed on property of the United States, nor shall the lands or other property of nonresidents be taxed

[19] *Compare,* Organic Act for Puerto Rico, Sec. 37; Appendix I, *ante,* p. 67); "shall extend to all matters of a legislative character not locally inapplicable".

higher than the lands or other property of residents, nor shall any law be passed impairing the right to private property, nor shall any unequal discrimination be made in taxing different kinds of property, but all property subject to the taxation shall be taxed in proportion to its value. Section 4 of the organic act places the legislative power and authority of the territory of Oklahoma in the Governor and legislative assembly.[20] Section 6 of the Organic act, *supra*, not only confers the authority subject to the reserved power mentioned, but contains specific limitations imposed upon the exercise of the authority. **Within the limitations noticed, the legislative power for local self-government is quite** as extensive in a territory **as in a State. The policy of** the government is to give to it the fullest opportunity to govern itself and prepare for statehood.

"The Supreme Court of the United States in the case of *Clinton* v. *Englebrecht*, 13 Wall. 434, 20 L. Ed. 659, has specifically so held. The court said: 'The theory upon which the various governments for portions of the territory of the United States have been organized has ever been that of leaving the inhabitants all the powers of self-government consistent with the supremacy and supervision of national authority, and with certain fundamental principles established by Congress.' This in our judgment is a correct statement of the rule involved, and the determination of the extent to which Congress has granted the right to the territory of Oklahoma to legislate must be ascertained from a construction of the powers specifically granted in section 6 of the organic act, *supra*, taken in connection with the manifest policy of the government in granting the power of legislation upon all rightful subjects of legislation as set forth above. **If the act of the territorial Legislation passed for the purpose of making effective and enforcible by its own authorities, an act to prevent combination in restraint of trade, was not in conflict and in no wise interfered with or affected the enforcement by the federal authorities of the act of Congress, then it occurs to us that**

[20] *Compare*, Sections 25, 9, and 57 of the Organic Act for Puerto Rico; Appendix I, *ante*, pp. 66, 67.

there is no good reason for saying that the same was annulled and rendered nugatory as soon as enacted by the previous act. There is nothing in the federal act proscribing or prohibiting to the legislative authority of the territory, the right to legislate upon this identical subject, nor is the same contained in any act of Congress to which our attention has been called. The right to legislate upon this subject and to have its act enforced by its own authorities was a valuable one to the people inhabiting the territory, and it ought not to be taken away by any strained or arbitrary construction.

"Attention is particularly directed to the numerous provisions making certain its enforcement which are not contained in the federal act, and which perhaps are not available to the prosecutors under it. * * * These additional provisions in no wise conflict with the federal act, and the same rule, that repeals by implication are not favored, pertains to the annulment of statutes in cases of this character. The United States Supreme Court in the case of *Cope* v. *Cope*, 137 U. S. 682, 11 Sup. Ct. 222, 34 L. Ed. 832, says: 'Annulments of statutes by implication, like repeals by implication, are not favored by the courts. No statute of a territory will be declared void because it may indirectly or by a construction which is possible but not necessary be repugnant to an act of Congress annulling legislation of the territory; but such a result must be direct and proximate in order to invalidate the statute.' The act under which these proceedings were brought had at that time been on the statute books of the territory of Oklahoma nearly 16 years. It was passed almost immediately after the approval of the federal act. This at least was a construction on the part of the territorial Legislature that it was necessary and essential, and that its terms were not repugnant to the federal act. Furthermore, section 1850 of the Revised Statutes of the United States provides that 'all laws passed by the legislative assembly and Governor of any territory (except certain territories not material here) shall be submitted to Congress, and, if disapproved, shall be null and of no

effect.[21] Section 3 of the organic act made it the specific duty of the Secretary of the territory of Oklahoma to transmit two copies of the laws of each legislative assembly within 30 days after its adjournment to the presiding officers of the Senate and House of Representatives of the United States.[22] This act doubtless in accordance therewith was presented to Congress and the fact that it was not disapproved is again a legislative construction making in favor of is validity.

"In the case of *Clinton* v. *Englebrecht, supra,* speaking of the controverted act passed by the territory in that case, and of this provision of the federal statutes, Mr. Chief Justice Chase, who delivered the opinion of the court, said: 'In the first place, we observe that the law has received the implied sanction of Congress. It was adopted in 1859. It has been upon the statute book for more than 12 years.[23] It must have been transmitted to Congress soon after it was enacted, for it was the duty of the Secretary of the territory to transmit to that body copies of all laws on or before the 1st of the next December in each year. The simple disapproval by Congress at any time would have annulled it. It is no unreasonable inference, therefore, that it was approved by that body.' **In addition to the foregoing reasoning** which in our judgment tends to the conclusion that this was a valid act of the territorial Legislature when passed, **a number of judges and courts have had occasion to pass upon the identical question** which is here presented to us, and a rule substantially correct is, we believe,

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[21] *Compare* Organic Act for Puerto Rico, Section 34; Appendix I, *ante,* p. 67.

[22] *Compare* Organic Act for Puerto Rico, Secs. 23 and 34; Appendix I, *ante,* pp. 66-67.

[23] **29 years** in the present case; Puerto Rican Act of March 14, 1907; carried into the "Compilation of Revised Statutes and Codes" of 1911 (Appendix I, *ante,* p. 69); and "continued in force" by Section 57 of the new Organic Act of Congress for Puerto Rico ("Jones Law") of March 2, 1917, ten years after its original enactment (Appendix I, *ante,* p. 67), and three years after the enactment of the Clayton Act of 1914.

annunciated in an opinion prepared by Judge Irwin of the Supreme Court of the territory of Oklahoma in the case of *Territory ex rel. Ridings* v. *Neville et al.*, 10 Okl. 79, 60 Pac. 790. This opinion, although not receiving the sanction of the majority of the members of that court, in our judgment expresses the law upon this proposition. He said: 'The territorial Legislature, being the representatives of the people of the territory, have the right to legislate for the people upon all subjects which are not in conflict with the Constitution of the United States, and do not in any way interfere with the supreme right of the United States government to direct and control the governmental affairs of the territory.' The foregoing in our judgment expresses the correct rule obtaining in reference to the power of the constituted legislative body of a territory to legislate in reference to matters with which Congress has likewise dealt. In this conclusion we are supported by a number of authorities. *Cooley's Constitutional Limitations* (7th Ed.) p. 54, note 1; *State* v. *Norman*, 16 Utah, 457, 52 Pac. 986; *Territory* v. *Guyot*, 9 Mont. 46, 22 Pac. 134; *Knudsen* v. *Hanneberg, et al.*, 8 Utah, 203, 30 Pac. 749; *In re Murphy*, 5 Wyo. 297, 40 Pac. 398; *Davis* v. *Beason*, 133 U. S. 333, 10 Sup. Ct. 299, 33 L. Ed. 637; *Cope* v. *Cope*, 137 U. S. 682, 11 Sup. Ct. 222, 34 L. Ed. 832. The law declared by the Supreme Court of Wyoming in the case of *In re Murphy, supra*, is as follows: **The fact that the Congress of the United States has enacted a law defining and punishing the crime of bigamy in the territories and other places over which the United States have exclusive jurisdiction did not restrict or impair the right of the Legislature of the territory of Wyoming to define and provide a punishment for bigamy as an offense against the territorial sovereignty and its laws.'** Such also is the holding of the Supreme Court of Utah in the case of *State* v. *Norman, supra* **'The acts of Congress defining "adultery", and prescribing punishment therefor, in the territories, as a crime against the United States, were not exclusive of territorial legislation on the same subject, and did not prevent the territorial Legislature from punishing by statute the same act as an offense against the territorial government and its laws.'** To the same effect in a degree is the declaration of the Su-

preme Court of Montana in the case of *Territory* v. *Guyot, supra:* 'We are aware of the broad distinction between the government of a state and territory, but the "legislative power of every territory shall extend to all rightful subjects of legislation not inconsistent with the Constitution and laws of the United States." Rev. St. U. S. sec. 1851. In *Hornbuckle* v. *Toombs,* 18 Wall. 655, 21 L. Ed. 966, it is adjudged that, "*as a general thing, subject to the general scheme of local government chalked out by the organic act, and such special provisions as are contained therein, the local Legislature has been intrusted with the enactment of the entire system of municipal law, subject, also, however, to the right of Congress to revise, alter, and revoke at discretion.*"[24] The powers thus exercised by the territorial Legislatures are nearly as extensive as those exercised by any state legislature.'

"We therefore conclude that the anti-trust act of the Legislature of the Territory of Oklahoma was not repugnant to or in conflict with the federal anti-trust act or any other constitutional or congressional limitation, and was a valid, existing statute of the Territory of Oklahoma."

Territory v. *Long Bell Lumber Co., supra,* 22 Okla. 890, 99 Pac. 911, 913-916.

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[24] Italics supplied.

APPENDIX IV

TERRITORY v. GUYOT, 9 Mont. 46; 22 Pac. 134
(Supreme Court of Montana. Aug. 3, 1889)
Sale of Liquor to Indians

BLAKE, C. J. The appellant has been convicted of the crime of selling whiskey at the county of Silver Bow in this territory "to a certain Indian," contrary to the form of the following statute: "If any person shall, directly or indirectly, sell, * * * intoxicating liquor * * * to any Indian or half-breed Indian in this territory, he shall be deemed guilty of a felony, and upon conviction thereof, shall be punished." Comp. St. div. 4, sec. 160. The sole question before us involves the constitutionality of this act. The counsel for the appellant and the attorney general concur in the view that the legislative assembly has no power to control this subject. The same issue was raised in the court below, where the validity of the statute was upheld. This assent of counsel would be decisive in ordinary actions, but we cannot permit any law to be adjudged null and void, or a provision of the constitution to be interpreted, without an investigation. The constitution provides that "the congress shall have power * * * to regulate commerce with foreign nations and among the several states, and with the Indian tribes." Article 1, sec. 8, subd. 3. In pursuance thereof a statute was passed in 1832, which has been amended from time to time, and is now comprised in the following section: "No ardent spirits shall be introduced under any pretense into the Indian country. Every person (except an Indian in the Indian country) who sells, exchanges, gives, barters, or disposes of any spirituous liquors or wine to any Indian under the charge of any Indian superintendent or agent, or introduces, or attempts to introduce, any spirituous liquor or wine into the Indian country, shall be punishable." Rev. St. U. S. sec. 2139. It is contended that the sale mentioned in the indictment was commerce "with the Indian tribes," within the meaning

of the words of the constitution, and that the power of congress is exclusive over the subject. The following cases are cited in support of the position which has been stated: *U. S.* v. *Holliday*, 3 Wall. 407; *U. S.* v. *Cisna*, 1 McLean, 254; *U. S.* v. *Burdick*, 1 Dak. 142; *U. S.* v. *Shaw-Mux*, 2 Sawy. 364; *Brown* v. *Houston*, 114 U. S. 622; *Robbins* v. *Shelby Co.*, 120 U. S. 489; *Bowman* v. *Railroad Co.*, 125 U. S. 465; *U. S.* v. *Earl*, 9 Sawy. 79, 17 Fed. Rep. 75.

The authorities establish certain principles, which are concisely announced in *Robbins* v. *Shelby Co.*, *supra*, by Mr. Justice BRADLEY:

> "The constitution of the United States having given to Congress the power to regulate commerce, not only with foreign nations, but among the several States, **that power is necessarily exclusive whenever the subjects of it are national in their character, or admit only of one uniform system or plan of regulation.** * * * Where the power of Congress to regulate is exclusive, the failure of Congress to make express regulations indicates its will that the subject shall be left free from any restrictions or impositions; and any regulation of the subject by the States, **except in matters of local concern only,** as hereafter mentioned, is repugnant to such freedom. * * * The only way in which commerce between the States can be legitimately affected by State laws is when, **by virtue of the police power,** and its jurisdiction over persons and property within its limits, a State provides for the security of the lives, limbs, health, and comfort of persons, and the protection of property; * * * the passage of laws to regulate or restrict the sale of articles deemed injurious to the health or morals of the community."

We concede that these principles are applicable to laws which regulate commerce "with the Indian tribes," and we must declare this statute of the territory unconstitutional if it is legislation of this nature, and not subject to any conditions. While the indictment alleges that the

whiskey was sold to a "certain Indian," the testimony proves that he belonged to the tribe living upon the Flathead reservation, and in charge of Mr. Ronan as agent. These facts bring the case within the purview of the foregoing statutes of the territory and the United States. The cases of *U. S.* v. *Holliday, supra; U. S.* v. *Shaw-Mux, supra*; and *U. S.* v. *Earl, supra,*—sustain the jurisdiction of the courts of the United States in trying and punishing persons who violate the laws of Congress prohibiting the sales of intoxicating liquors to Indians, and maintain the power of Congress to enact statutes governing the subject under the clause of the constitution regulating commerce with the Indian tribes. These doctrines are not questioned by this court, and do not decide that a State or territory has no right to pass laws making definite acts of its citizens in selling intoxicating liquors to Indians crimes, and prescribing penalties for their infraction.

It will be instructive to consider the exceptions in *Robbins* v. *Shelby So., supra,* which are embraced within the police power of the States, and particularly the restrictions upon the traffic in intoxicating liquors. In *Ex parte Smith,* 38 Cal. 707, Mr. Justice SANDERSON says:

> "Legislatures have enacted a variety of laws, which undoubtedly, in a general sense, affect the rights of life, liberty, property, safety, and happiness, by way of restraint. Of such are laws regulating the slaughter of animals, the interment of the dead, the erection of buildings in cities and towns of inflammable materials, the manufacture and keeping of gunpowder and other explosive compounds, the vending of poisons and other noxious drugs, the sale of intoxicating beverages to certain classes of persons, as Indians, and even to all classes of persons, as in the case of the prohibitory liquor laws of Maine and Massachusetts. * * * The constitutionality of some of this legislation has been debated and doubted; but I believe the general opinion now is that none of it is opposed, but, on the contrary, that all of it is not only consistent with, but essential

to, the most perfect enjoyment, in a constitutional sense, of the natural rights of persons."

In *License Cases,* 5 How. 577, Mr. Chief Justice TANEY says:

"But although a State is bound to receive and to permit the sale by the importer of any article of merchandise which Congress authorizes to be imported, it is not bound to furnish a market for it, nor to abstain from the passage of any law which it may deem necessary or advisable to guard the health or morals of its citizens, although such law may discourage importation, or diminish the profits of the importer, or lessen the revenue of the general government. And if any State deems the retail and internal traffic in ardent spirits injurious to its citizens, and calculated to produce idleness, vice, or debauchery, I see nothing in the constitution of the United States to prevent it from regulating and restraining the traffic, or from prohibiting it altogether if it thinks proper."

In *Foster* v. *Kansas,* 112 U. S. 206, Mr. Chief Justice WAITE says:

"In *Bartemeyer* v. *Iowa,* 18 Wall. 129, it was decided that a State law prohibiting the manufacture and sale of intoxicating liquors was not repugnant to the constitution of the United States. This was reaffirmed in *Beer Co.* v. *Massachusetts,* 97 U. S. 25, and that question is now no longer open in this court."

In *Railroad Co.* v. *Husen,* 95 U. S. 470, Mr. Justice STRONG in the opinion, observes:

"We admit that the deposit in Congress of the power to regulate foreign commerce and commerce among the States was not a surrender of that which may properly be denominated 'police power.' What that power is it is difficult to define with sharp precision. It is generally said to extend to making regulations promotive of domestic order, morals, health, and safety."

Mr. COOLEY, after commenting upon the authorities concerning the laws affecting the manufacture and sale of intoxicating drinks as a beverage, concludes:

> "They are looked upon as police regulations established by the legislature for the prevention of intemperance, pauperism, and crime, and for the abatement of nuisances." *Const. Lim.* (4th Ed.) 727.

Mr. Justice HOLMES, in a note to Kent's Commentaries, refers to the police power of the government and says:

> "The most remarkable cases as to the exercise of this power are those arising out of the liquor laws. Such laws do not interfere with the power of Congress to regulate commerce, if they prohibit the sale of imported liquor only when it has passed out of the hands of the importer, or when the original packages have been broken up by him." Volume 2 (12th Ed.) 340, note 2.

In *Gas. Co.* v. *Louisiana Light Co.*, 115 U. S. 650, Mr. Justice HARLAN says:

> "That there is a power sometimes called the 'police power' which has never been surrendered by the States, in virtue of which they may, within certain limits, control everything within their respective territories, and upon the proper exercise of which, under some circumstances, may depend the public health, the public morals, or the public safety is conceded in all the cases."

See, also *Black, Const. Prohib.* sec. 65; *Mugler* v. *Kansas*, 123 U. S. 623; *Kidd* v. *Pearson*, 128 U. S. 1.

We are aware of the broad distinction between the government of a State and territory, but "the legislative power of every territory shall extend to all rightful subjects of legislation not inconsistent with the constitution and laws of the United States." Rev. St. U. S., Sec. 1851. In *Hornbuckle* v. *Toombs*, 18 Wall. 655, it is adjudged that,

"as a general thing, subject to the general scheme of local government chalked out by the organic act, and such special provisions as are contained therein, the local legislature has been intrusted with the enactment of the entire system of municipal law, subject, also, however, to the right of congress to revise, alter, and revoke at its discretion. The powers thus exercised by the territorial legislatures are nearly as extensive as those exercised by any State legislature."

There is no limitation upon the authority of a territory to pass laws for the regulation and restriction of "the sale of articles deemed injurious to the health or morals of the community." The act under consideration is clearly within the police power of the territorial government, as defined by the courts, and is not inconsistent with the constitution and laws of the United States. The judgment is affirmed, and the original judgment is hereby directed to be carried into execution as entered in the court below.

BACH and LIDDELL, *JJ.*, concur.

APPENDIX V

OPINION OF THE SUPREME COURT OF UTAH

State v. *Norman*, 16 Utah, 457: 52 Pac. 986.

BARTCH, J. The defendant was prosecuted for and convicted of the crime of adultery. Upon being sentenced to the penitentiary for one year, he appealed to this court.

Counsel for the appellant contend that, at the time the act was charged to have been committed, there was no law in force in this State which made adultery a public offense. They argue that the act of the territorial legislature respecting polygamy, adultery, and other kindred offenses, approved February 4, 1892 (Sess. Laws 1892, p. 5) was never a valid law of the territory of Utah, and, except as to polygamy, never effective in the State by any provision of the constitution, and that the law of Congress which provided for the punishment of adultery as a crime ceased to have force in Utah upon the transition of the territorial to the State form of government.

The provisions of the act of 1892, respecting the crime of adultery, is found in section 3, which reads:

> "That whoever commits adultery shall be punished by imprisonment in the penitentiary not exceeding three years; and when the act is committed between a married woman and a man who is unmarried, both parties to such act shall be deemed guilty of adultery; and when such act is committed between a married man and a woman who is unmarried, the man shall be deemed guilty of adultery."

This provision prescribed the punishment for, and defined the acts which constitute, adultery, and is the same as section 3 of the act of Congress of March 3, 1887, known as the "Edmunds-Tucker Law." The territorial act contains other provisions concerning polygamy, bigamy, and other offenses which are similar to provisions contained in the

"Edmunds-Tucker Law," and in the act of Congress approved March 22, 1882, known as the "Edmunds Law," but none of the provisions of the act of 1892 appear to be repugnant to any provision contained in either of the acts of Congress.

It is insisted, however, for the appellant that the acts of Congress fully covered the whole subject, and deprived the legislature of the power to legislate concerning the same, and that, therefore, the act of 1892 was absolutely void. **It is true the territory of Utah was a mere dependency of the United States, but as organized by Congress its governmental functions were almost as extensive as those of a State.** Like a State, it had an executive, a legislative, and a judicial department, and, unless disapproved by Congress, the enactments of the legislature were as binding upon the people of the territory as the statutes of a state are upon its people. A person who violated the statutes of the territory could be apprehended and punished the same as one who violated the laws of a State. Although a mere dependency, and not a sovereignty like a State, the territory had, subject, of course, to the Constitution of the United States and laws of Congress applicable to it, all the governmental power necessary to constitute, in all respects, an adequate and complete government of its people. True, its supreme power was lodged in Congress, and Congress could legislate directly for the territory. The laws of Congress enacted for it constituted its fundamental law, the same as the constitution constitutes the fundamental law of the State. **It follows that, where the laws of Congress upon any subject were exclusive, the legislature of the territory had no power to legislate; and so, where the power vested by the Constitution of the United States in Congress to legislate upon a subject is exclusive, the legislature of a State cannot legislate.** Both governments are subject to the Constitution of the United States. **Exclusiveness, therefore, is the test which, in each government, determines the right of the legislature to legislate as to any subject upon which the power to legislate is vested in Congress,** for neither a State nor territorial legislature

has a right to enact laws respecting a subject concerning which the power to legislate is exclusively vested in Congress, whether it be so vested by express provision of the Constitution or by necessary intendment. The doctrine on this subject was stated by MR. CHIEF JUSTICE MARSHALL in *Sturges* v. *Crowninshield,* 4 Wheat. 122, 193, thus:

> "Whenever the terms in which a power is granted to Congress, or the nature of the power, require that it should be exercised exclusively by Congress, the subject is as completely taken from the State legislature as if they had been expressly forbidden to act on it."

The true object to be attained, then, and the nature of the power, are to be considered in determining its exclusiveness, **and evidently the controlling principles are the same, whether it be attempted to declare an enactment of a State void, because of an exclusive power in Congress to legislate upon the subject, by reason of a provision of the Constitution of the United States, or to declare an enactment of a territory void because of the exclusiveness of the legislation of Congress on the subject for the territory.**

The organic act under which the government of the territory of Utah was constituted, provided, in section 6 thereof, as follows:

> "That the legislative power of said territory shall extend to all rightful subjects of legislation, consistent with the constitution of the United States and the provisions of this act; but no law shall be passed interfering with the primary disposal of the soil; no tax shall be imposed upon the property of the United States; nor shall the lands or other property of nonresidents be taxed higher than the lands or other property of residents. All the laws passed by the legislative assembly and governor shall be submitted to the Congress of the United States, and if disapproved shall be null and of no effect."

Under the first clause, the territorial legislature had power to legislate as to "all rightful subjects of legisla-

tion'' consistent with the Constitution of the United States and with the act. Then follow restraining provisions as to legislation concerning certain subjects, and a provision whereby any enactment of the legislature might be disapproved by Congress, and thereby rendered invalid. The converse is equally true, that if an enactment was not disapproved it was valid, unless in conflict with the Constitution of the United States, or unless the legislation of Congress on the same subject was exclusive, or the territorial law was in conflict therewith.

In *Clinton* v. *Englebrecht,* 13 Wall. 434, 446, where the principal controversy was concerning a territorial statute, it was observed:

> ''The law has received the implied sanction of Congress. It was adopted in 1859. It has been upon the statute book for more than twelve years. It must have been submitted to Congress soon after it was enacted, for it was the duty of the secretary of the territory to transmit to that body copies of all laws on or before the 1st of the next December in each year. Thus simple disapproval of Congress at any time would have annulled it. It is no unreasonable inference, therefore, that it was approved by that body.''

The power which thus could be exercised by the territorial legislature was nearly as extensive as that exercised by any State legislature. *Hornbuckle* v. *Toombs,* 18 Wall. 648.

Nor are we able to find any provision in the organic act, or in any of the laws of Congress applicable to the territory of Utah, which in any wise operated to restrain the legislature from enacting laws respecting polygamy, adultery, or other kindred offenses. The laws of Congress were not enacted because the legislature had no power to legislate on these subjects. Nor was the nature of the power such as to prevent the legislature from exercising it. **Acts and conduct which offend the moral sense and affect the welfare of the community constitute rightful subjects of legislation, and**

the legislature having had the fundamental authority to legislate on such subjects, *and the acts of Congress containing no limitation of such authority, nor any exclusive legislation on the subject, the legislature had the right to enact the law of 1892, and therein define and punish adultery as a crime, even though the Edmunds-Tucker law, previously enacted by Congress, provided for the punishment of such acts as offenses against the laws of the United States.* The fact that an offender might thus possibly be subjected to a second punishment for the same act did not render the act of 1892 void. Each inhabitant of the territory of Utah was also an inhabitant of the United States, and was therefore a subject of each government, and owed allegiance to and was amenable to the laws of each. If, therefore, he perpetrated an act which constituted an offense against the United States, and also an offense against the territory and its local laws, we know of no legal principle which prevented him from becoming subject to punishment by each government, and neither of such punishments would be in contravention of the constitutional inhibition against the twice putting in jeopardy for the same offense. That inhibition does not operate as to the act, but as to the offense, and an offense, in legal significance, is the transgression of a law. If, however, in any case, principles of justice dictate that both governments ought not to prosecute and punish the offender for the same act, the courts may, and many of them do manifest a disposition, in the absence of express legislative command, to accept the prosecution and punishment in one jurisdiction as a ground for relieving the wrongdoer from prosecution for the same act in the other, although the law is well settled that each government has the right to prosecute for such act.

In Bish. Cr. Law, section 178, the author says: "There are, we have seen, wrongful acts of a nature to violate duties both to the United States and a particular state, and some of these acts are declared crimes by the positive laws

of each." It is probably the doctrine of the courts, though not free from doubt in principle, that, whenever Congress has the constitutional power to render a thing punishable as a crime against the United States, she can make this legislation exclusive of State law. But, however this may be, **if the national statute neither in terms nor by necessary implication excludes the State law, the latter is not superseded.** Congress doubtless had the power to make the legislation exclusive of territorial law, because in the organic act is expressly reserved the power to disapprove all legislative enactments, and the fact that it failed to disapprove the act of 1892 should receive due consideration in determining the validity of that law. * * * * *

In the case of *In re Murphy,* 40 Pac. 398,[25] the validity of section 74, c. 73, Sess. Laws 1890, Wyo. Terr., an enactment respecting bigamy, was assailed on the ground that at the time of its enactment there existed a law of Congress punishing bigamy in all the territories. That case is very like the one at bar. The [State] supreme court held the territorial statute valid, and, in the course of the opinion, MR. JUSTICE POTTER said:

> "The crime of bigamy, as defined and punishable by act of Congress, is a crime against the sovereignty of the United States. The Act of Congress embraces no express limitation upon the right of the territory to also punish the same act as an offense against it and its local laws, nor upon the local legislature to enact a law defining and providing a punishment therefor as an offense against the territorial sovereignty. As there are, in practical and legal effect, two governments, although the one emanates from the other, we are unable to perceive why the legislature of the territory, under the general grant of power with which it was invested, may not have enacted a valid law assuming to punish as a territorial offense the crime of bigamy. It does not conflict with the United States statute. It

[25] 5 Wyo., 297; *ante,* pp. 40, 47, 52, 54, 55, 82.

> could not and did not assume to destroy the force or effect of the congressional provision."

Bish. Cr. Law, Sec. 179, 987, 989; *Cooley, Const. Lim.,* P. 37, note 1; *Fox* v. *State,* 5 How. 410; *Miners' Bank* v. *State,* 12 How. 1; *Territory* v. *Guyot,* 9 Mont. 46, 22 Pac. 134; *Harlan* v. *People,* 1 Doug. (Mich.) 207; *Knudsen* v. *Hanneberg,* 8 Utah, 203, 30 Pac. 749; *Cope* v. *Cope,* 137 U. S. 682.

In support of their position, counsel for the appellant cite the case of *Prigg* v. *Com.,* 16 Pet. 540. That case was commented upon in the case of *Moore* v. *People, supra* [14 How. (U. S.) 13], and the questions decided were clearly pointed out. An examination will show that they were entirely different from the questions presented in this case. Nor do we think that MR. JUSTICE FIELD, in *Davis* v. *Beason,* 133 U. S. 333, by the use of the expression, "The cases in which the legislation of Congress will supersede the legislation of a state or territory, without specific provisions to that effect, are those in which the same matter is the subject of legislation by both," intended to establish a doctrine that would abrogate a territorial statute like the one in question here. Nor do we think such an intention manifest from the whole opinion, for in a preceding portion thereof (the statute under consideration being a law of the territory of Idaho respecting bigamists, etc.), and after quoting from the act of Congress referring to the same subject, he observed:

> "This is a general law applicable to all territories and other places under the exclusive jurisdiction of the United States. It does not purport to restrict the legislation of the territories over kindred offenses or over the means for their ascertainment and prevention."

We are of the opinion that the act of 1892, concerning adultery and other crimes, and prescribing the punishments for the same, was a valid exercise of legislative power, and that the statute is not in conflict with the laws of Congress.

The remaining question to be determined, on this branch of the case, is, was section 3 of the act of 1892 continued in force in the State by the [State] constitution? * * * * *

We find no reversible error in the record. The judgment is affirmed.

MINER, J., concurs.

APPENDIX VI

Davila v. District Court of Mayaguez

OPINION OF SUPREME COURT OF PUERTO RICO, 43 P. R. Dec. (Spanish Ed.) 554; May 27, 1932

Opinion by MR. JUSTICE WOLF.

The petitioners were charged with infringing the law to protect commerce against conspiracies and monopolies enacted by the insular Legislature, March 14, 1907, Laws of that year, page 328, on the ground that the vendors of the greater portion of the gasoline sold in Mayaguez, accused in this case, had formed a combination by which they agreed on a fixed price for the sale of such gasoline and refused to sell it at the current price, and likewise refused to sell to anyone who would not pay the price fixed by one of them and agreed to by the others, or by all the others, and carried out other acts tending to prevent competition. A demurrer filed in the District Court of Mayaguez was overruled. Various questions were discussed in the lower court which have not been presented by the petitioner in this case, and, therefore, we find it unnecessary to consider them.

(1) The petitioners have presented an application for a writ of prohibition in this tribunal on the ground that the District Court was without jurisdiction to hear and determine the case because the matter of monopolies and restrictions on commerce was covered by the federal statutes on that subject, namely, the so-called Sherman Act of 1890, 26 Stats. at Large, p. 209, and the Clayton Act, 38 Stats. at Large, p. 730. The provisions of the Sherman Act which are alleged to be applicable read as follows: [*Quoting at length sections 2 and 3 of the Sherman Act, ante;* Appendix I, p. 63]. There has been some discussion as to whether or not the writ of prohibition may run in this case but we entertain no doubt but that if the District Court of Mayaguez was really without jurisdiction, the writ may run.

(2, 3, 4) The petitioners rely upon the case of *People* v. *Galanes et al.*, 15 Dec. P. R. (*Spanish Ed.; English Ed.* 15 P. R. Rep. 365, 378) where we said:

> "There is another thing to be noted in passing, and that is, that the federal Anti-trust Law of July 2, 1890, U. S. Statutes at Large, Vol. 27, p. 209, of 1890, applies to the territories. Under section three therein contracts in restraint of trade are forbidden in the District of Columbia and the territories; but that law says nothing with respect to monopolies. We think that the federal law would control as far as it went, and hence that the court did not have jurisdiction to entertain an information with respect to contracts in restraint of trade; in other words, that the part of the Law of March, 1907, which attempts to restrict contracts in restraint of trade, is against the Organic Act inasmuch as the act provides for the application here of all laws of the United States which are not locally inapplicable. (Section 14 of the Organic Act.) To this effect is the decision in the case of *Territory versus Alexander*,[26] 89 Pac., 514."

At the time of that decision this court had an idea that Puerto Rico, although not an incorporated territory, ought to be considered as a territory of the United States, to which general statutes could be applicable. After the decisions of the Supreme Court of the United States in the cases of *People* v. *Muratti*, 245 U. S. 639; and *Balzac* v. *Puerto Rico*, 258 U. S. 298, we believe that the rule is established that Puerto Rico, although an organized, is not an incorporated territory.

In each one of our Organic Acts there appears the following: [*Quoting section* 14 *of the former Organic Act, the "Foraker Act", ante,* Appendix I, p. 67, *which is also, substantially, section 9 of the present Organic Act, ante,* Appendix I, p. 66].

Under the above cited decisions of the United States Supreme Court a general law of the United States appli-

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[26] The Arizona case, *supra*, 11 Ariz. 172.

cable to the "territories" would not include an unincorporated territory such as Puerto Rico unless the Congress manifested such an intention. The case of *Gonzales* v. *People of Puerto Rico*, 51 F. (2d) 61, also appears to be applicable.

We agree with the lower court that the Sherman Act is not applicable in Puerto Rico by its own terms. We do not find anything in its provisions demonstrating that the Congress intended it to embrace an offense committed in Puerto Rico.

The lower court likewise called attention to the fact that in every case in which the Congress has intended a federal law to extend to Puerto Rico, it has used the words "Porto Rico" or "insular possessions", or some other such phrase. The lower court cited the following laws: Act of February 12, 1915 (Laws of Puerto Rico of 1930, p. 105) [27]; Act of March 4, 1915 (Laws of 1930, p. 107); Act of August 10, 1917 (Laws of 1917, Vol. II, p. 71); Act of October 6, 1913 (Laws of 1917, Vol. II, p. 161); Act of May 4, 1916 (Laws of 1917, Vol. II, p. 69); Act of March 4, 1929 (Laws of 1930, p. 119); Act of February 27, 1921 (Laws of 1930, Vol. p. 107); Act of October 28, 1918 (Laws of 1923, p. 97); Act of September 21, 1922 (Laws of Puerto Rico of 1930, p. 109); Act of January 28, 1915 (Laws of 1930, p. 101).

With reference to the Clayton Act it is enough to say that the offenses comprehended by that act were not imputed here, and the lower court so found as to the accusation in this case. In accordance with our various Organic Acts designated, the first the Foraker Act and the second the Jones Law, the same general powers are given to the Legislature of Puerto Rico that any legislature of the United States may exercise, and thereby the Legislature of

[27] Acts of Congress deemed applicable in Puerto Rico are re-published in a preliminary portion of the session laws of Puerto Rico, for each regular session of the Legislature.

Puerto Rico has the right to enact a law against monopolies and restrictions on commerce in form similar to that which the Congress of the United States or the legislature of any State has the power to enact; unless, perhaps, where a federal statute clearly covers the ground.

We say "perhaps", because we are not fully convinced that a federal law and a local law may not co-exist, and that a person might not be proceeded against for an offense which is one against the local law as well as against the federal law. In other words, we have at present some doubts in respect to whether the Sherman Act or the Clayton Act, even if they were to be considered as extending to Puerto Rico, would prevent the Legislature from enacting a similar law.

Let the writ of prohibition be vacated.

Associate Justice Córdova Davila took no part.

SUBJECT-INDEX

	Page
I. No "conflict" between local statute and federal anti-trust acts.—The central point of this case	1-12
II. Territorial statute bears substantially same relation to acts of Congress as does municipal ordinance to State statute.—May re-enact, and add to, provisions of the superior statutes, so long as no conflict is created	12,13
III. Question whether federal anti-trust acts run to Puerto Rico is open in this case	14-18
IV. The Congress has not annulled this Porto Rico Anti-Trust law, or similar Territorial statutes	19
CONCLUSION	19

TABLE OF CASES

Balzac v. Porto Rico, 258 U. S. 298	10
Clinton v. Englebrecht, 13 Wall. 434	19
Davis v. Beason, 133 U. S. 333	10
Fajardo Sugar Co. v. Holcomb, 16 F. (2d) 92, 96	19
Grafton v. United States, 206 U. S. 333	4,5,7,8,9,10,13,
Gulf, Colorado & Santa Fe Ry. Co. v. Hefley, 158 U. S. 98	3
Myers v. United States, 228 U. S. 549, 558	19
People of Puerto Rico v. Shell Co., 86 F (2d) 577 [*This case, in the C. C. A.*]	15,16,17
Rogers v. Jones, 1 Wend. 237	12
Romeu v. Todd, 206 U. S. 358	10
Southport v. Ogden, 23 Conn. 128	13
State v. Flint, 63 Conn. 248	13
Territory v. Alexander, 11 Ariz. 172	13
Tiaco v. Forbes, 228 U. S. 549, 558	19
United States v. Geomaine, 99 U. S. 508	11
United States v. Mouat, 124 U. S. 303	11
United Theatres v. District Court, 47 P. R. Dec. (*Spanish Ed.*) 725	2,15,17

STATUTES

(Omitting references to the federal anti-trust acts and the local anti-trust act of Puerto Rico, here under discussion, which are in Appendix I, pp. 63-66, 69-70, of our "Brief for Petitioner")

	Page
FEDERAL	
Articles of War (old), Rev. Stats., Sec. 1342	
Article 58	6
Article 62	5
Articles of War: Revision of 1920, Act of June 4, 1920; Articles 92, 93, 96	5,7
Organic Act for Puerto Rico	
Sec. 13	11
Sec. 14	11
Sec. 40	10
Sec. 41	11

OTHER AUTHORITIES

Bishop, Crim. Law, Vol. I, Sec. 32	6
ib.—7th Ed., Sec. 1050	8
Winthrop, Mil. Law and Precedents (2nd Ed. 1895)	6,7

IN THE

Supreme Court of the United States

OCTOBER TERM, 1937

No. 18

THE PEOPLE OF PUERTO RICO, *Petitioner*,

vs.

THE SHELL CO. (P. R.) LIMITED, *et al*, *Respondents*.

REPLY BRIEF FOR PETITIONER

I

There is no conflict between the local statute of Puerto Rico here involved and the federal statutes, either the Sherman Act or the Clayton Act.

This is, perhaps, the central point of this case. The reasoning of the respondents really implies, in effect, that if there be no conflict between the local law and the federal law, then there is no reason why the local law may not stand.[1] At bottom, their insistence is really on the proposition, with which we wholly agree, that where the local statute is **"in conflict with"** a federal statute, there the latter must prevail.

[1] The suggestion in the one of the briefs (*Shell Co.*, pp. 21-22), that a mere "*risk* of conflict" is sufficient to invali-